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OF THE

National Tax Association

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TAXATION AND THE WAR

In the four months since our last issue the world has been moving on apace. At that time the allied nations were in a state of anxious tension awaiting the outcome of the enemy's offensive and nerved to withstand the shock at whatever cost. Today, after three months of victorious progress, the atmosphere is one of buoyant confidence that the crisis has been passed and ultimate victory is assured. Nothing but our own blunders can now deprive us of the complete triumph. From now on our clear duty is to stand firm against every move for an inconclusive peace and to redouble every effort to assure and hasten the complete triumph of our cause.

On the field of battle American troops are already engaged, gloriously and decisively. American finance is likewise performing mighty service. Taxation, already heavy, must grow heavier still in order that we may give all of our strength to the cause. The eight billion dollar revenue bill, unanimously passed by the House of Representatives in September, is the largest tax measure in history. With some amendments, it will very probably be law before another issue of the BULLETIN. That it will place a heavy burden on us all goes without saying. That this burden will be cheerfully borne admits of no question. Even such inequalities and injustices as will doubtless remain in the law must be accepted philosophically. The one thing now is to win the war.

This summer the air has been full of tax investigation and tax discussion. In this the National Tax Association has taken its part. We have made war finance the main theme of this issue of the BULLETIN, and we trust that these pages may give our readers some notion of what has been transpiring and clearer ideas of some of the great financial problems of the war.

THE CONFERENCE

Another year has passed and we are again planning for the annual conference. It has become our habit to try to make each succeeding conference "the best one yet," in which ambitious design we believe we have usually been successful. How long that can be kept up is of course problematical, but we are not going to give up this time.

There will be obstacles to contend with

this year. Transportation is inconvenient and expensive, and many of our members are overburdened with heavy duties arising from war conditions. On the other hand, there was never a time when the problems of taxation were of more predominant importance and never a time of greater opportunity for service in our special field. There is good reason, therefore, why every member should strive to make this conference a great success, particularly by contributing his own presence and ideas. Our meeting place is in a wide-awake section which we have not heretofore visited. St. Louis is an ideal convention city and we are assured of a hearty welcome and hospitable entertainment.

The preliminary program is printed in full in this BULLETIN. Several additions and changes will doubtless be made. Special attention is naturally given to the problems of federal taxation. The report of the committee on a model tax system will be an important event, and valuable results will certainly follow the full discussion of that report. Missouri and the neighboring states have some interesting problems on their hands, which will be adequately presented and discussed. For further announcements, see the preliminary program on a later page.

DELEGATES—DELEGATES

As time draws near the need is urgent for giving serious attention to the appointment of delegates to the St. Louis Conference. The strenuous demands of political campaigns, coupled with the almost continuous exertions of the State Executives in connection with troop movements and other activities occasioned by the war, have doubtless prevented attention to this matter. It is now vitally necessary that action should be taken and members should see to it that suitable delegates are appointed. This may readily be accomplished with a little perseverance.

At no time in the nation's history has it been more important that the states should take counsel together towards perfecting their revenues and protecting their sources of taxation. Every reason exists for having a thoroughly representative body of official delegates in attendance at this Conference.

MODEL TAX SYSTEM COMMITTEE'S REPORT

The extent of the interest in this report is indicated by the numerous inquiries that have been received as to its publication. These have come from taxing officials, special commissions, and investigators in several states. The report has now been printed and copies have been sent to all members; additional copies may be obtained from the Treasurer. We think that its perusal will disclose the fact that this report forms perhaps the most important addition to tax literature that has been issued and that far-reaching results may be confidently expected to follow from its publication.

The sincere thanks of the membership are due our President who, as Chairman, bore the largest share in the preparation of this notable contribution to the subject of taxation. The intensely practical nature of the report is its most helpful characteristic, while at the same time it presents in a masterly and scientific manner the underlying principles which must be observed in the solution of our tax problems.

It remains for the members to put this report to its best use, and this may be done effectively by giving it careful, thorough, and critical study. As stated in the report, the Committee wishes it given deliberate examination with a view to perfecting it at points where changes may, upon full consideration, seem desirable. Most important of all, it is urgent that there be full and impartial discussion of its contents at the St. Louis Conference. To this end all needed time will be allowed on the program for such discussion, and members in attendance will be most helpful if they will come fully prepared to participate.

Those unable to attend can perform a great service if they will express in writing their views and criticisms. Communications addressed to the Secretary will be carefully analyzed and preserved for presentation during the discussion.

THE COMMITTEE ON FEDERAL TAXATION

We call special attention to the work of this committee. Appointed by the Executive Committee of the National Tax Association late in June, this committee has devoted itself during the summer to the task

of ascertaining and analyzing the views of the members of the Association on the practical questions involved in the construction of the revenue law of 1918. A carefully worded questionnaire was drawn up and sent to all members of the Association. On September 18, a preliminary report, covering replies received up to that time, was prepared and sent to officers of the Treasury Department and members of Congress. This report is printed elsewhere in this issue of the BULLETIN.

Although it realized the time and thought required for an intelligent answer to its questionnaire, the committee is somewhat disappointed at the small number of replies received. Efforts to secure a more general response will be continued before the final report is presented to the Conference in November. We strongly urge all who have not yet done so to give the committee the benefit of their views on this important subject while there is still time for us to be of service.

PROFESSOR LUTZ JOINS THE STAFF

The work of editing the BULLETIN is growing all the time, and the Editor has felt the need of assistance. He considers himself very fortunate in having been able to draft Professor Harley L. Lutz of Oberlin College, who will have charge, beginning with the present issue, of the department of RECENT PUBLICATIONS. Professor Lutz is well known to the members of the National Tax Association through appearance on past conference programs, and through his valuable book *The State Tax Commission*. Readers of the BULLETIN will have reason to join the Editor in mutual congratulation upon his appointment to our staff.

THE NOVEMBER BULLETIN

War finance and conference announcements have pretty largely monopolized our space this month. We have, accordingly, been forced to put over to the next number some valuable contributions on other subjects. Look out for the November BULLETIN. It will be a good one.

Professor Fairchild has been granted leave of absence from Yale University for the remainder of the year in order to make certain investigations for the State Department. The office of Secretary of the National Tax Association and the editorial office of the BULLETIN will be located till December 28 at 3755 Broadway, New York City.

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Sworn and subscribed before me this 8th day of October, 1918. CHAS. E. LONG, [SEAL] Notary Public.

(My commission expires Jan. 21, 1919.)

PRELIMINARY PROGRAM
OF TWELFTH ANNUAL CONFERENCE
ON
TAXATION
PLANTERS HOTEL
ST. LOUIS, MISSOURI
November 11-16, 1918

UNDER THE AUSPICES OF
THE NATIONAL TAX ASSOCIATION

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Wives of above gentlemen will compose the Ladies Reception Committee, Mrs. Henry W. Kiel, *Chairman*.

Preliminary Program

Monday Evening, November 11

REGISTRATION OF DELEGATES AND MEMBERS

Tuesday Morning, November 12, at 9:30 o'clock

INFORMAL RECEPTION

All members, delegates, and guests and ladies accompanying them are invited to meet one another and renew acquaintances.

FIRST SESSION

Tuesday Morning, November 12, at 10:30 o'clock

1. Organization of Conference.
2. Addresses of welcome: Hon. Frederick D. Gardner, Governor of Missouri.
   Hon. Henry W. Kiel, Mayor of St. Louis.
   Jackson Johnson, President St. Louis Chamber of Commerce.
3. Responses.

MISSOURI PROBLEMS

1. The Tax Legislation of Missouri.
   Frederick N. Judson, Esq.
2. Recent Tax Legislation in Missouri.
   Professor Isidor Loeb, University of Missouri.
3. The State Tax Commission and its Work.
   Hon. Cornelius Roach, Chairman Missouri Tax Commission.
4. An Analytical Study of the Workings of the General Property Tax in a Selected County.
   Professor W. F. Gephart, Washington University.

DISCUSSION

SECOND SESSION

Tuesday Afternoon, November 12, at 2 o'clock

FEDERAL TAXATION

1. Address by Honorable Daniel C. Roper, Commissioner of Internal Revenue.
2. Report of Committee on Federal Taxation.
   Thomas E. Lyons, Wisconsin Tax Commission, lately member Advisory Committee to the Internal Revenue Department, *Chairman*.
3. Observations on State Taxation of Railroads under Government Operation and Control.
   James M. Gray, Attorney-at-Law, Brooklyn, N. Y.

DISCUSSION

Note.—Other speakers for this session will be announced in the final program.

THIRD SESSION

Wednesday Morning, November 13, at 10 o'clock

THE REGISTRATION TAX ON INTANGIBLES

1. The Connecticut Choses-in-Action Tax.
   Professor Fred R. Fairchild, Yale University, Secretary National Tax Association
2. The Secured Debts Tax in Michigan.
   Hon. O. B. Fuller, Auditor General.
3. The New York Investments Tax.
   Hon. James A. Wendell, Deputy State Comptroller.
4. The Secured Debts Tax of Missouri.
   Hon. Cornelius Roach, Chairman State Tax Commission.

DISCUSSION

FOURTH SESSION

Wednesday Afternoon, November 13, at 2 o'clock

Report of Model Tax Committee.
Professor Charles J. Bullock, Harvard University, President National Tax Association, *Chairman*.

Followed by Round Table Discussion of the Report.

FIFTH SESSION

Wednesday Evening, November 13, at 8 o'clock

Continuation of Round Table Discussion of Report of Model Tax Committee.

SIXTH SESSION

Thursday Morning, November 14, at 10 o'clock

PROBLEMS OF OTHER STATES

1. It is planned to have a discussion of conditions in certain of the neighboring states in which more or less agitation for changes has been going on, with definite suggestions for remedies by qualified speakers from each state. It is anticipated that thereby these particular states will be benefited and at the same time the suggestions made will be helpful to all.

   The states from which reports are expected are Illinois, Indiana, Tennessee and Arkansas.

2. The Rhode Island Inheritance Tax.
   J. P. Mahoney, Rhode Island Board of Tax Commissioners.

SEVENTH SESSION

Thursday Afternoon, November 14, at 2 o'clock

ROUND TABLE

EIGHTH SESSION

Friday Morning, November 15, at 10 o'clock

1. The Taxation of Banks.
   W. M. Harrison, Secretary Savings Bank Section, American Bankers' Association.
   Discussed by J. P. Mahoney of the Rhode Island Board of Tax Commissioners.
2. Tax and Debt Limitation Laws.
   William H. Hoyt, Attorney at Law, New York City.
3. Report of Committee on Inheritance Tax.
   Jno. S. Chambers, State Comptroller of California, *Chairman*.
4. State Excises on Foreign Corporations.
   Professor Thomas Reed Powell, Columbia University, New York City.

DISCUSSION

NINTH SESSION

Friday Afternoon, November 15, at 2 o'clock

1. The Work and Influence of the National Tax Association—How they may be extended.
   Lessing Rosenthal, Attorney at Law, Chicago, Ill.
2. Annual Review of Legislation and Constitutional Changes.
   C. C. Williamson, Statistician Advisory Council on Methods of Americanization.
3. Business Session of the Conference.
4. Business Meeting of the National Tax Association.

ADJOURNMENT

Headquarters

The sessions will be held in the Convention Hall on the parlor (second) floor, where will be located also the general reception room, the registration office, and the rooms kindly furnished by the hotel management for the use of the officers and committees.

Old Colony Club

Through the courtesy of the Old Colony Club, the privileges of that Club and the facilities of its rooms, which are also located in the Planters Hotel, are to be kindly extended to all members and delegates.

Acknowledgment

The co-operation and assistance of the Chamber of Commerce and of the Convention Bureau as well as of other organizations have been graciously extended to the officers in planning for this conference and grateful acknowledgment is made. It is a pleasure to refer particularly to the help extended by Mr. Charles F. Hatfield of the Convention Bureau, Honorable Cornelius Roach, Chairman of the State Tax Commission, and Professor W. F. Gephart, of Washington University.

THE EXCESS PROFITS TAX OF 1917

GEORGE E. HOLMES

PART I

On March 3, 1917, the first American excess profits tax act became effective. The statute was simple in form and the rate of tax was moderate. Only partnerships and corporations were taxed. A flat rate of eight per cent was imposed on that part of the net income which exceeded the sum of $5,000 plus eight per cent of the actual capital invested. "Actual capital invested" was defined to include (1) actual cash paid in, (2) the actual cash value at the time of payment of assets other than cash paid in, and (3) paid in or earned surplus and undivided profits used or employed in the business; and to exclude money or other property borrowed by the corporation or partnership. The net income of a corporation or partnership for the purpose of this tax was to be determined in the same manner as for income tax purposes under the Act of September 8, 1916, i. e., dividends were to be included. The incomes of partnerships derived from agriculture or from personal services were exempt from the tax.

A storm of protest greeted the introduction of this bill, which was heightened by the unfortunate expression of its sponsor that the tax would be collected and paid north of the Mason and Dixon line. Nevertheless, the bill was enacted in its original form, but its effect was nullified by the Act of October 3, 1917, by which it was superseded and which became retroactive to apply to the income for the entire year beginning January 1, 1917. A small amount of tax was collected under the Act of March 3, 1917, from corporations and partnerships whose fiscal years ended after the beginning of the calendar year and prior to the passage of the later law. In all such cases the amount of tax paid under the Act of March 3, 1917, was, by express provision of the Act of October 3, 1917, credited toward the payment of the tax imposed by the later law for the same period, or refunded. Practically, therefore, the first American excess profits tax was that imposed by the Act of October 3, 1917.

Excess Profits versus War Profits

Less than two months had passed after the enactment of the Act of March 3, 1917, before the need for revenue compelled consideration of a new revenue bill. On May 9 a bill was introduced in the House calculated to raise what was then considered to be the tremendous sum of $1,810,420,000. In this measure it was proposed to leave the Act of March 3 on the statute books with, however, three important amendments: (1) that invested capital should not include the value of good will, trade marks, trade brands, or franchise unless paid for specifically as such in cash or tangible property (i. e. not when paid for in stock of the corporation or shares of the partnership) but, by implication, should include borrowed money or property;[1] (2) the exemption of income of partnerships derived from agriculture was revoked and the exemption of income from personal services was limited to professional partnerships having no substantial capital; and (3) income derived from dividends upon the stock of other taxable corporations or partnerships was declared exempt. It was also proposed in effect to increase the rate by an additional eight per cent, making a total of sixteen per cent on all income in excess of the sum of $5,000 plus eight per cent of the invested capital.

The Finance Committee of the Senate discarded the proposal of the House and proposed in its place a "war profits tax" to take the place of the Act of March 3. This tax was to apply to individuals as well as to corporations and partnerships. It was to tax the profits from all trades or businesses except (1) employment where the remuneration was fixed and definite (as a salary) irrespective of any contingency, and (2) professions requiring only a nominal amount of capital. The basis of the tax was to be the excess of the net income for the taxable year over the average annual income of the pre-war period (1911, 1912,

[1] H. R. 4280, 65th Cong., 1st Session, sec. 202.

and 1913), which latter was to be increased or reduced proportionately to the increase or reduction of the capital investment in the business since the pre-war period.

Many mutations took place in the Finance Committee and on the floor of the Senate. At first invested capital was defined to be the fair average value of the assets actually invested and employed in the business or trade less the average amount of liabilities, the value of patents, copyrights, trademarks, or like intangible assets, however not to exceed the cash value thereof at the beginning of the pre-war period, and the value of good will and franchises not to be included except to the extent of the actual cash or actual cash value of tangible property specifically paid or exchanged therefor. Income arising during the taxable year was not to be included as capital employed during such year. In the next draft of the bill no definition of invested capital appeared, the report of the Finance Committee explaining that, since that draft proposed in all cases to base the deduction on either the pre-war earnings of the taxable concern or on the pre-war earnings of representative concerns, it was not necessary to take into consideration the capital of the trade or business. This draft, however, contemplated the ascertainment of capital actually employed in the trade or business in certain cases, so that the omission of a definition was not in all respects satisfactory. In any event, the Senate finally adopted a decidedly modified plan and inserted a new definition of invested capital which was the prototype of the definition as it now stands in the law. In the Senate drafts of the bill it was first proposed that in no case should the deduction for pre-war profits be less than six per cent of the invested capital. In the first and second draft no maximum deduction was fixed, the intent being that the pre-war earnings, no matter how high, should measure the deduction.[2] In the third draft the Senate modified the war profits tax plan by limiting the deduction with respect to pre-war earnings to an amount not less than six per cent or more than ten per cent of the actual invested capital for the taxable year, except in the case of trades or businesses chiefly carried on by means of personal services and in which the capital is only nominal as compared with the gross income. The principle of a straight war profits tax was, therefore, discarded by the Senate, and the disagreement between the Senate and the House was not on the principles of the proposed tax, but on the rates, the definition of invested capital and other matters of detail.

In all the Senate measures the rate of tax was based on the percentage of excess of income over the deduction allowed for pre-war profits. Thus, the *deduction* was the standard by which the rates were applied to the excess profits, instead of the invested capital. The minimum rate was twelve per cent on that part of the excess profits which did not exceed an amount equal to fifteen per cent *of the average amount of annual profits for the pre-war period*. The maximum rate was first fixed at fifty per cent of the amount by which the excess profits exceeded two hundred and fifty per cent of the pre-war standard of profit, but was finally increased to sixty per cent on the amount of excess profits exceeding three hundred per cent of the pre-war standard. This method of measuring the tax was discarded by the conference committee, composed of members of both Houses, in favor of the present measure based upon the invested capital.

This sketch of the development of the principles of the tax during the period of transition of the bill in the Senate is necessarily brief to come within the scope of this article. It illustrates, perhaps, how Congress groped in a new field of taxation for general principles on which to base a revenue measure of unprecedented character and magnitude. That such a measure when finally agreed upon should in some degree be defective and imperfect was inevitable. In framing a revenue bill Congress works under great pressure from all quarters, and it is conceivable that calm, impartial judgment must give some ground to prejudice, impulse, and expediency in so large a body. For instance, it was shown that some corporations had issued tremendous amounts of capital stock in the guise of consideration for good will. Presto, no corporation could have credit for good will acquired in exchange for its stock except to the very limited extent allowed to the

[2] The revenue bill of 1918, now in Congress, proposes a similar war profits tax with a minimum deduction of ten per cent and no maximum limit.

worst offenders. Again, it is difficult to appraise the value of a patent as of any given time in the past, since subsequent increase in value must necessarily influence the judgment. It was, therefore, considered advisable to place a limit on the value which might be assigned to patents for which stock had been issued. The par value of the stock issued for the patent, an expedient measure, was adopted as the limit. In the great majority of cases this did no injury, but woe betide the poor benighted citizen who purchased a patent for a goodly sum and placed the title thereto in a corporation as a matter of convenience, issuing only a nominal amount of capital stock. He "pays through the nose," as our English friends put it for not following the prevailing fashion in corporate organization.

It may be argued that cases such as that above are exceptional. True, perhaps, but the taxing statute which operates with gross injustice in even one exceptional case, and precludes any action for relief on the part of the aggrieved taxpayer, is economically unsound and justly reprehensible. And that is the criticism of the first American excess profits tax. Congress was too reluctant to lodge sufficient power and discretion in the Treasury Department to enable it properly to treat the exceptional case. The statute is a rigid, inelastic instrument that cuts to a certain fixed pattern. It shaves off the excess profits in most instances, misses them in many others and often digs deep into the moderate normal profits of the taxpayer whose invested capital is not shaped on conventional lines. Form and not substance determines the taxpayer's liability. We have much to learn in the new field of taxation.

The Treasury Department's Rulings

No doubt some constitutional questions lurked in the statute. A strict administration of the act and a literal interpretation of its clear provisions would in some most exceptional cases actually have confiscated the capital of the taxpayer. In many more cases it would have worked great hardship without relief in the courts; for the expediency of levying a tax, or the economic mistake or wrong involved in its imposition, is beyond judicial cognizance.[3] But the courage and foresight of the Commissioner of Internal Revenue did much to mitigate the harshness of the law. Contrary to the long-established custom of the Treasury Department he decided not to administer the law with a sole view to exacting every cent of revenue which it could be made to yield on a construction most favorable to the government, but to take the more liberal judicial view that gives more consideration to the taxpayer. An able committee of citizens appointed by him drafted the regulations under which the law was administered. It is an open secret that the letter of the statute does not support some of these regulations, but the spirit of the statute is preserved. Much relief has been extended by the regulations, but even the most liberal interpretation cannot take proper care of all exceptional cases — the law is too insistent in its regard of form.

The Theory of the Tax

The income tax may be said to be based on the theory that every one with income over a minimum amount is able to contribute to the burden of government. As the income increases the ability increases in more than direct proportion. So we have our graduated income tax rates. A somewhat similar theory seems to underlie the excess profits tax. That business (whether carried on by an individual, a partnership or a corporation) [4] which made a profit of more than a specified percentage on the capital invested therein was deemed able to bear an additional tax burden. That ability was considered to increase progressively as the income increased. Hence graduated rates of tax on the income of the business were devised. The graduated rates, however, were not made to depend on the absolute amount of taxable income as are the graduated income tax rates on individuals, but on the relation of the business income to the invested capital; since graduated rates applied to the absolute amount of income would bear unfairly on the partnership or corporation with large capital and

[3] *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.

[4] The revenue bill of 1918 proposes to levy the excess profits or war profits tax only on corporations. The reasons given therefor are that the increased normal and surtax rates upon the incomes of individuals and partnerships will in most cases make the taxes paid by such individuals as high as the income and excess or war profits taxes paid by corporations engaged in a similar business and that it is difficult to administer an excess profits tax applicable to individuals.

having many members or stockholders, as compared with those having little capital or few members. Where no capital was employed or merely a nominal capital, a flat rate of tax applied.

Briefly stated, the excess profits tax of 1917 was imposed on the amount of net income from any trade or business for the taxable year after deducting not less than seven per cent nor more than nine per cent of the invested capital (plus a specific sum of $3,000, allowed to corporations, or $6,000, allowed to partnerships and individuals) at graduated rates, unless no invested capital or merely a nominal capital was employed, in which case a single rate of tax was applied.

Invested Capital

The law said, in effect, to the taxpaying business concern, "You will be allowed to make a certain profit on the amount of capital that has actually been put into this business, and if you make profits in excess of that amount a part of such excess profits will be taken as a tax." But the proposition was not so simple as this might indicate. Capital is put into a business in many ways and it is often difficult to determine the money value thereof. Hence, these general rules were laid down in the statute:

(1) The invested capital should be averaged monthly.

(2) It should not include capital invested in any assets the income from which was not subject to the tax.[5] Dividends on the stock of other taxable corporations were exempt from this tax; similarly interest on state and municipal bonds. On the income side such income was segregated from other income; on the capital side the capital which produced that income was also segregated, leaving the taxable income and the invested capital which produced that income to be compared one against the other for the purpose of the tax. One exception was made, namely, capital invested in obligations of the United States, which could be included whether or not the income was taxable. The purpose of this exception is, of course, obvious.

Assets which could not be included in invested capital were called "inadmissible assets" in the regulations. Congress did not foresee that while the income from certain kinds of stocks and bonds might not be subject to the tax, a taxpayer whose invested capital was very largely represented by such inadmissible assets could nevertheless be in receipt of a very considerable taxable income from such investment, in the form of profits from the sale thereof. Being deprived of his invested capital on the one hand, and on the other being required to include the profits made by the use of that capital, would have been an unpleasant predicament for many a dealer in stocks and in municipal securities had not the regulations permitted in such cases the inclusion in invested capital of all or a part of his inadmissible assets, the amount depending on the ratio of his trading profits to his total profits and income from such assets. Thus, if his trading profits represented eighty per cent and his tax-free interest or dividends represented twenty per cent of his year's income from capital invested in inadmissible assets, eighty per cent of such assets were allowed him as invested capital in computing the tax.

(3) Borrowed money or property could not be included in invested capital. The British law excludes "borrowed money or debts." A proposition which merits careful consideration is whether after all it would not be more equitable to allow borrowed money to be included as invested capital and to tax the income before interest paid thereon is deducted. Borrowed money is just as much a part of the capital of a business as any other asset and, if the corporation is considered as an entity for the purpose of the tax, its entire capital should be the basis of deduction, regardless of the nature of the ownership of that capital. Then the large borrower would stand on equal footing with the one whose capital has been contributed in other forms. On the other hand, if the tax is regarded as a tax on the aggregate profit of a group of stockholders collected through the corporation, then the tax should be imposed after deducting the dividends paid to preferred stockholders entitled to only a fixed dividend, and such preferred stock should be excluded from invested capital. As the

[5] The British statute excludes "any capital the income on which is not taken into account for the purpose of the tax." *Finance* (no. 2) *Act*, 1915, Fourth Schedule, part 3. Under the British law income from investments in not included, except where the principal business consists of making investments and in the case of life assurance companies.

situation now exists a corporation can well afford to convert its bonds into preferred stock at a higher rate of return on the investment, since the additional invested capital thereby acquired more than offsets the direct expense.

Of course, Congress had in mind that interest paid on borrowed money is a proper business expense, and probably assumed it would be deducted in computing the net income. This was true as to individuals and partnerships, but not as to corporations with respect to which the income tax law permitted the deduction of only so much of the interest paid during the year as was actually paid on an amount of indebtedness not exceeding the sum of (a) the capital stock outstanding at the close of the year and (b) one-half of the interest-bearing indebtedness outstanding at the same time. The regulation gave relief by allowing a portion of such borrowed money to be included in invested capital, determined by the ratio of the amount of interest the corporation could not deduct to the entire amount of interest paid.

A further complication arose as to inadmissible assets and borrowed money. This will illustrate the situation: A corporation with $50,000 of capital stock and $50,000 of bonds might have $50,000 inadmissible assets and $50,000 of admissible assets. Query: Should the capital stock be considered as invested in either one of the two classes of assets or equally in both? The regulations solved the problem by holding that the borrowed money would be offset against the inadmissible assets and only so much of the latter as exceeded the borrowed money would be deducted from invested capital.

To be concluded in the November number. p. 30

CONSUMPTION TAXES

HENRY B. GARDNER
Professor of Economics, Brown University

The raising of war revenue is simply a means for placing in the hands of the government the purchasing power which it needs to pay its military forces and control the productive agencies necessary to equip and care for them. The tests of the efficiency of the method employed are the amount of revenue secured, and the degree of success achieved: first, in curtailing the expenditure of private individuals who compete with the government for the control of the nation's productive forces; and second, in avoiding curtailment of productive energy and of the willingness of the people to respond to the demands of the government, upon which depends its ability to continue to raise the constantly increasing revenues which modern warfare demands.

The relative merits of loans and taxes as means for accomplishing these purposes has been treated elsewhere. The purpose of this article is to point out the necessity of a well-balanced tax system if the resources of the nation are to be utilized to the full and maintained unimpaired.

The two main classes of taxes upon which governments must rely are direct taxes (including income taxes, in the broad sense of that term, and inheritance taxes) and consumption taxes. Each has its advantages and disadvantages. Direct taxes make it possible to place the burden on the classes best able to bear it and to distribute it among individuals in approximate proportion to their ability. In countries of great wealth, such as the leading industrial nations of today, direct taxation can be made enormously productive, and can be used to reach the abnormally large incomes enjoyed by certain individuals as a result of the war itself. It unquestionably acts also to curtail private expenditure.

On the other hand, on account of difficulty of assessment, it fails to reach the great mass of the population who as a whole receive and expend the greater part of the national income; and, pushed beyond certain limits it involves the danger of deadening the energy of those upon whom we must mainly rely for a full and vigorous use of the nation's resources, under the existing industrial organization. Employed exclusively it creates a sense of injustice which inevitably works in the same direction.

Consumption taxes can also be made to

yield enormous revenues in countries as wealthy as the United States. They can be used to reach the same classes reached by income taxes and to discourage the consumption of articles of luxury, thus releasing productive forces for the use of the government; but their distinctive merit is that they afford the most effective means of reaching the great mass of the population which as a whole can fairly be called upon to make a large contribution to war taxes. To accomplish this latter purpose they must be levied upon widely used articles and, in view of their effect in curtailing consumption, preferably upon articles which can be dispensed with, without serious injury or even with positive advantage to the community. The objection commonly urged against such taxes is their regressive character, but this quality becomes a merit when they are used not as the main element in the tax system but as a balancing element supplementary to progressive income and inheritance taxes paid by a small fraction of the population.

England and the United States alone among the belligerent nations have from the beginning pursued the policy of providing through taxation not only for the interest on the new debt but for a substantial portion of actual war expenditure.

In the financial year 1917-18 revenue other than from loans sufficed to cover 34 per cent of the total expenditures (other than for advances to allies) in the United Kingdom and 50 per cent in the United States. The increase in such revenue over the last peace year (1914 and 1917 respectively) sufficed to meet 27 per cent of the increase in expenditure (including interest on the war debt) in the United Kingdom and 43 per cent in the United States, or to provide for the interest on the war debt and in addition 20 per cent of the increase in expenditure in the United Kingdom and 42 per cent in the United States. In both countries this was accomplished mainly through the increase of income taxes and the imposition of taxes on excess profits due to the war rather than by the increase of revenue from consumption taxes. Between 1914 and 1918 the revenue from such taxes in the United Kingdom increased from $236,000,000 to $2,298,000,000, while revenue from consumption taxes increased from $375,000 to $550,000.

In the United States the European war involved an increase of expenditure even before our own declaration of war. This increase, as in the case of the United Kingdom, was met mainly by an increase of direct taxation (in the form of income taxes, taxes on the profits of the makers of munitions, and taxes on inheritances) which grew from $60,700,000 in 1914 to $393,400,000 in 1917, while consumption taxes (customs and internal) increased only from $600,000,000 to $630,000,000. The act of October 3, 1917, made substantial additions to internal consumption taxes, and as a net result of a decline in receipts from customs duties and an increase of internal taxes, consumption taxes in the year ended June 30, 1918, apparently produced about $1,000,000,000. The main burden, however, was again borne by direct taxes which through the increase of income taxes and the addition of a general excess profits tax grew to over $2,800,000,000.

The failure of England to secure a more substantial increase of revenue from consumption taxes was due not to lack of legislation, for the tax rates have been greatly increased, but to the curtailment of consumption of the taxed articles, particularly of liquors, due to the lack of raw materials resulting from the interruption of commerce. The failure to fully develop consumption taxes in the United States on the other hand was due mainly to lack of adequate legislation. The duties on liquors and tobacco were increased and some articles not hitherto taxed were levied upon, but the rates were low when compared with the rates imposed in England. Important articles such as tea, coffee, and sugar, universally recognized as legitimate objects of taxation, were not touched. Both countries, particularly the United States, must meet largely increased expenditures during the coming year. The English budget proposes an increase of from 20 per cent to 25 per cent on incomes; increases of 100 per cent, 70 per cent, and 30 per cent, respectively, on liquors, sugar and tobacco, estimated to yield an additional $240,000,000; and the addition of luxury taxes on the model of the French tax of December, 1917.

The expenditure of the United States for the current year will probably be double that of 1917-1918. If we are to maintain the financial policy already estab-

lished we must double our taxes. There is no doubt that large additional revenue can be derived from the income tax and the excess profits tax. The rates of the latter are still well under the English rate of 80 per cent. While our income tax rates on the largest incomes exceed the English rates, they are much below the latter on the smaller incomes. However, to attempt to raise from excess profits and income taxes anything like the whole of the increased revenue needed will push the use of these sources to, if not beyond, the danger limit. It seems clear that the time has come when, in order to preserve a well-balanced tax system which will utilize the resources of the country to the full and preserve the sense of an equitable distribution of the tax burden, so essential to the smooth working of any system, we must plan for a large extension of consumption taxes which will reach the great mass of farmers and wage-earners into whose hands the greater portion of the national income goes, who apparently during the present year have fully shared in whatever seeming financial gains the war has brought, and who cannot be effectively reached through income and excess profits taxes.

The necessity of greatly increasing consumption taxes has apparently been realized by the House Committee. The bill now under consideration, while proposing approximately 100 per cent increase of total tax revenue over that of last year, contemplates nearly 150 per cent increase in the revenue from consumption taxes, if that term be interpreted broadly so as to include taxes on transportation and transmission of messages. The estimates indicate that under the proposed legislation consumption taxes, including customs duties, will yield about 30 per cent of the total tax revenue. Congress, however, still shows a strong disinclination to utilize to the full certain taxes which have long been recognized both in theory and practice as legitimate elements in a system of taxes on consumption, taxes which reach the mass of the population, not merely, as do the luxury taxes, the classes which are already bearing the burden of direct taxation.

The taxes on tobacco, even if the present rates are doubled (substantially the proposition of the House Committee), will still be low as compared with the English rates. The same is true of the taxes on sugar, while tea, coffee, and cocoa are to be left on the free list.

The present rate on manufactured tobacco is 13 cents a pound; on cigars from \$4 per 1,000 ($^4/_{10}$ cent per cigar) on cigars retailing at from 4 cents to 7 cents, to \$10 per 1,000 (1 cent per cigar) on cigars retailing at over 20 cents; on cigarettes, \$2.05 per 1,000. These rates are low. The English rate on manufactured tobacco is \$1.95 per pound, and in the budget of 1918-19 it is proposed to increase it to \$2.48. The English rates on cigars and cigarettes are also levied by the pound and amount to \$2.94 on the former and \$2.38 on the latter, with proposed increases to \$3.69 and \$3.03, respectively. It is difficult to estimate the equivalent on a pound basis of our rate on cigars, but it is safe to say that it is under rather than over 50 cents. On cigarettes it is about 70 cents. There seems to be no reason why the rates on manufactured tobacco should not be increased to 75 cents, and the rates on cigars and cigarettes quadrupled instead of doubled. This would mean 1.6 cents per cigar retailing from 4 cents to 7 cents to 4 cents per cigar retailing at over 20 cents and 16 cents per package of 20 cigarettes. Such rates would bring in \$100,000,000 more revenue than the proposed rates or would appreciably curtail consumption, either of which results is to be desired. Such rates on cigars would not be excessive, judged by our own practice during the Civil War. Under the act of June 30, 1864, the tax on cigars ranged from \$8 to \$45 per 1,000.

Under the tariff act of 1909 the base rate on sugar was $^{95}/_{100}$ cent on sugar testing below 75 degrees. The rate increased with the fineness of the sugar, the maximum being 1.9 cents on refined sugar. The act of 1913 reduced the base rate to $^{71}/_{100}$ cent, increasing to 1.334 cents on sugar testing between 98 degrees and 99 degrees and 1.36 on sugar testing between 99 degrees and 100 degrees. In all cases there is a deduction of 20 per cent on sugars from Cuba, which supplies the bulk of our imports. The rate actually collected on sugar of the grades imported into the United States is about 1 cent per pound. These rates might well be tripled. The rate actually collected would then be about 3 cents per pound, equivalent to a nominal rate (without allowance for the

Cuban deduction) of approximately 4 cents per pound. The English rate on sugar testing over 98 degrees is 3 cents per pound, and it is proposed in the budget for 1918-19 to increase it to 5.7 cents. As it would not be the intention to make the additional duty protective, an excise tax of approximately 2 cents a pound should be imposed on sugar produced in the United States and imported from its colonial possessions. If, as is probable under existing conditions, the increase of the tax did not diminish the consumption of sugar, it would yield about $150,000,000 additional revenue.

Taxes of 16 cents, 8 cents, and 7 cents on tea, cocoa, and coffee, respectively, would apparently yield a revenue of nearly $100,000,000. The corresponding English rates are 24 cents, 9 cents, and 9 cents. There seems to be only one valid argument in favor of the policy followed in regard to these taxes. The tax on liquors has been an element of great importance in all systems of consumption taxes and it will continue to yield a large revenue in this country during the present year, but under existing legislation it will cease at the end of the year. It will be convenient at that time to have the increased taxes on tobacco and sugar and taxes on coffee, tea, and cocoa to take its place. That these taxes should be included in our system of consumption taxes there can be no question. It would seem that a much higher tax than the 2 cents per gallon proposed in the House bill might well be levied on gasoline and that it would be possible to make the tax progressive on gasoline used for pleasure cars, which would be effective in curtailing unnecessary consumption.

If the war continues for another year it is safe to say that a still larger proportion of revenue must come from consumption taxes, for, notwithstanding all that may be said in favor of income taxes, consumption taxes probably offer the most effective method for utilizing to the fullest extent the tax-paying power of the nation. A general tax on sales, even at a low rate, would apparently prove to be the most productive tax available. A partial tax of this sort was the most productive element in our tax system during the Civil War, and if the war continues through 1919 we may be compelled to resort to it in spite of the objections which may be urged against it from the point of view of the theory of taxation.

PENDING REVISION OF THE INCOME AND PROFITS TAXES

ALFRED E. HOLCOMB

In view of the comprehensive nature of the act now pending in Congress and of the drastic rates proposed, the following general comments on the income and war profits tax features of this measure, with reference to the principal changes from existing law, may be of interest to readers of the BULLETIN.

The act is entitled "An act to provide revenue, and for other purposes," and is known as H. R. 12863, 65th Congress, 2d session. It was passed by the House of Representatives September 20, was reported in the Senate September 21 and immediately referred to the Finance Committee, where it is, at this writing, under consideration.

The act contains 13 titles designated respectively as follows: (1) General definitions; (2) Income tax; (3) War profits and excess profits tax; (4) Estate tax; (5) Tax on transportation and other facilities, and on insurance; (6) Tax on beverages; (7) Tax on cigars, tobacco and manufactures thereof; (8) Tax on admissions and dues; (9) Excise taxes; (10) Special taxes; (11) Stamp taxes; (12) Advisory tax board; and (13) General administrative provisions.

Title I. Definitions

This title contains helpful definitions of words used throughout the act. The definite elimination of Porto Rico and the Philippines from the term "United States" appears to be the principal change. By a subsequent provision the Act of 1916, as amended by the Act of 1917, is made ap-

plicable to the income tax in these possessions.

Title II. Income Tax

A complete redrafting of the previous acts is made, with a codification of all pertinent provisions, resulting in a simplification helpful to the taxpayer. The income tax imposed by this act is to be in lieu of that imposed by prior acts. The provisions applicable to individuals are grouped separately from those relating to corporations, preceded by definitions and followed by general administrative provisions applicable to both groups. In this discussion it has seemed to be most helpful to depart from the strict order of the various sections and to present the subject in an order which would appeal to one about to make a return, referring to appropriate sections as they appear applicable to this order of treatment, taking up first the sections applicable to individuals and following with those applicable to corporations.

Individuals

1. *Liability to the tax.*—Every individual, whether of age or a minor, a citizen of the United States or residing therein, having a net income, less credits, in the amount made taxable (as hereinafter stated); every non-resident alien, with respect to income derived from sources within the United States; every fiduciary (as defined) with respect to income held in trust for future distribution and which is not regularly distributed, is liable to the tax.

The provision taxing minors is the only material change. Their income is now taxed through a parent or guardian.

2. *Liability to make return.* — The provisions as to the return are designed to assure the discovery of taxable individuals and to prevent evasion. Those included are all individuals having a net income, without allowance for credits, of $1000 if single or if married and not living with husband or wife, or $2000 if married and living with husband or wife. Husband and wife living together may make a joint return, otherwise each must make return if their aggregate income is $2000. If a taxpayer is unable to make his own return, it may be made by a duly authorized agent.

Every fiduciary (except receivers in possession of part only of the property of an individual) must make a return for the individual, estate, or trust for whom or which he acts, (1) if the income distributed by him is sufficient to render the beneficiary liable to make a return, or (2) if the net income of the estate or trust held for future distribution is $1000 or over or if any beneficiary of such estate or trust is a non-resident alien. Apparently the return in case (1) and in the case of a non-resident alien beneficiary, is for purposes of information only (see above under *liability to the tax*) but there is an apparently conflicting provision making the fiduciary liable in all cases.

Partnerships are required to make returns for information, showing the net income of the partnership, the names and addresses of the partners, and their distributive shares.

A non-resident alien in order to receive the benefit of the deductions and credits allowed, must file a complete return of his total income from all sources in the United States, except that under regulations, such allowances may be received upon his filing claim with a withholding agent.

The provisions for returns by withholding agents and for general returns of information will be described below.

Upon request, a corporation must give information as to undistributed income with the names of the shareholders who would be entitled thereto if distributed.

It will be seen that definite provision is made for joint returns by husband and wife which is now allowed by regulation. The requirement for a return of gross income above a certain amount, as recommended by a committee of this Association, has not been made.

From gross income, certain deductions are made and against the sum thus obtained, certain credits are allowed, the resulting amount being the taxable net income. It will therefore be desirable to explain these various factors.

3. *Gross income—what it includes.*—The general definition of gains, profits, and income follows substantially the present law. The important departure is in expressly including the salary of the president of the United States, and of federal judges.

4. *Certain items expressly excluded from gross income.* — Additional exemptions to those in the present law, include the pro-

ceeds of life insurance policies paid to estates; income received by foreign governments from investments in the United States; amounts received through accident or health insurance or under workmen's compensation laws and salaries of soldiers and sailors serving abroad, up to $3,500. The existing exemption as to income from securities of states and subdivisions thereof, is removed as to such securities as may be hereafter issued. As to such securities, the exemption is continued as to interest on a principal sum of $5000. This exemption corresponds with the existing exemption as to federal securities (except the first liberty loan).

It is to be noted here that by the new amendment to the second liberty bond act, recently passed by Congress, additional exemption from surtaxes is provided as to income from liberty loan bonds. Under this amendment, interest on the fourth liberty loan bonds is exempt on a principal amount not exceeding $30,000 and interest on the other issues on a principal amount not exceeding 1½ times the taxpayer's subscription to the fourth issue, not, however, in excess of $45,000.

At present non-resident aliens are exempt from surtaxes upon dividends if such income is derived from sources without the United States. The new provision makes all dividends taxable if derived from "resident" corporations. "Resident corporations" are nowhere defined, but it would appear to include those organized in the United States. The taxation thus of foreigners upon income from investments entirely outside the United States, merely because they have seen fit to take out a domestic charter, seems unwise.

5. *Certain items of gross income—how ascertained.*—The act provides certain specific rules for computing gains, profits, and income which, in the main, follow existing regulations or are required by the decisions of the supreme court.

A "dividend" is defined as any distribution made by a corporation out of its earnings or profits accrued since February 28, 1913 (the effective date of the 16th amendment). A "corporation" includes associations, joint stock companies, and insurance companies. Stock dividends are specifically taxable as income to the extent of the profits distributed.

Any distribution is deemed to have been made from earnings unless all earnings have first been distributed. Any distribution made in 1918 or thereafter, is deemed to have been made out of profits accrued since February 28, 1913. Earnings accrued prior to March 1, 1913, are not taxable upon distribution. A distribution made as the result of a liquidation of a corporation is to be treated as the realization to the stockholders of proceeds of their stock and to indicate gain or loss accordingly.

Gain or loss on the sale of property is to be determined by comparing the price realized with the fair market price or value on March 1, 1913, or if acquired since that date, with the cost or the inventory value when such inventory is, in the judgment of the commissioner of internal revenue, necessary to show the profit or loss.

Items are to be included in gross income for the taxable year in which received unless, under methods of accounting which the taxpayer may adopt, they are properly accounted for in some other period. In the absence of such methods, or if the taxpayer does not keep books, the calendar year is the taxable year.

The commissioner may require the use of inventories in order to determine net income whenever he deems it necessary. A taxpayer may compute his income and return the same upon the basis of his annual accounting period and in accordance with his usual methods of accounting unless the commissioner determines that such method does not clearly reflect his income.

6. *Deductions.* — The deductions from gross income allowed, follow generally existing law. The following comments may be made: Salaries, to be allowable as deductions, must be paid for personal services "actually rendered"; all losses on transactions not connected with the business of the taxpayer are allowed, thus removing a source of widespread criticism. Losses of property through fires, storms, or other casualty are allowed, though not connected with the trade or business of the taxpayer. Special provision is made for amortization of buildings erected in connection with war activities. Contributions to charitable organizations up to 15 per cent of the taxpayer's income are continued as to residents. As to non-resident aliens, they are limited to those made to domestic corporations and associations. Non-resident aliens must file complete income returns in order

to receive the benefit of the deductions. Income, war profits and excess profits taxes imposed by foreign countries are excluded as deductions. They are allowed as a credit against the tax as hereinafter stated.

7. *Credits.*—The personal exemption allowance is classed as a credit. The change is in extending the $200 exemption for dependents so that it includes persons other than children. A non-resident alien is allowed the personal exemption credit only if his country allows a similar credit to United States citizens residing therein. He must file full return of income in order to secure the benefit of the credits, except that under certain conditions claim for the credits may be filed with a withholding agent. Credit for interest on securities exempt from the normal tax, included in gross income, is allowed.

8. *Where and when return filed.* — The return is to be filed on or before the 15th of the third month following the year in which the income is computed; if for a calendar year, on or before March 15, instead of March 1, as at present.

9. *The tax rates.* — The normal tax rate (computed on net income less credits) is 6 per cent upon the first $4000 and 12 per cent upon the balance; upon a non-resident alien, 12 per cent upon all.

The surtax rates (computed upon entire net income), with comparison with existing rates, are as follows:

Income			
Exceeding	*Not Exceeding*	*Rate Per cent*	*Present Law Per cent*
$5,000	$7,500	2	1
7,500	10,000	3	2
10,000	12,500	7	3
12,500	15,000	7	4
15,000	20,000	10	5
20,000	30,000	15	8
30,000	40,000	20	8
40,000	50,000	25	12
50,000	60,000	32	12
60,000	70,000	38	17
70,000	80,000	42	17
80,000	90,000	46	22
90,000	100,000	48	22
100,000	150,000	50	27
150,000	200,000	50	31
200,000	250,000	52	37
250,000	300,000	52	42
300,000	500,000	54	46
500,000	750,000	58	50
750,000	1,000,000	58	55
1,000,000	1,500,000	60	61
1,500,000	2,000,000	60	62
2,000,000	5,000,000	60	63
Over	5,000,000	65	63

10. *Credit against tax.* — Income, war profits, and excess profits taxes paid in foreign countries and which, by this bill are excluded from deductions as above stated, are allowed as a credit against the total income tax of the taxpayer if a citizen of the United States. In the case of an alien resident a like credit is allowed if his country grants a similar credit to citizens of the United States residing therein.

11. *Payment at source.* — The existing provisions as to withholding-at-source on payments of income (other than interest on "tax-free" bonds) to non-resident aliens, are continued at a rate increased to 12 per cent. The rate on interest on "tax-free" bonds, whether paid to aliens or residents, is 2 per cent as at present.

12. *Information at source.* — The existing provisions as to information-at-source are continued except that the return of information applies to payments of income of $1000 or over, instead of $800 or over.

13. *Payment of the tax.* — The changes in the provisions as to payment present some difficulties. Apparently the long-established and seemingly appropriate and necessary requirement of an *assessment* as a basis for the tax, is eliminated and a system of "self-assessment" is established under which the taxpayer makes payment based upon his return, subject to correction, with consequent penalties, upon some future examination and an assessment made as a result, at any time within five years. This change, overturning as it does, customs which have long existed and disturbing rights announced in court decisions, seems likely to raise questions of some difficulty connected with the tax period, penalties, false and fraudulent returns. It would seem wise to retain the provisions for assessment and notice and demand for tax as a definite basis upon which the status of the taxpayer may be determined.

Provision is made for payment of the tax in instalments, one-third of the amount shown in the return, at the time of filing the same, one-third two months thereafter, and one-third four months thereafter. There are provisions for delinquency and for examination by the commissioner and a "recomputation" by him. The provisions with respect to "fault" and "negligence" on the part of the taxpayer seem likely to prove obscure.

14. *Publicity of returns.* — A new pro-

vision requires a list of the names of income tax payers to be open to public inspection in the office of each collector.

Title III. Income Tax on Corporations

The rate of the tax on income of corporations is 18 per cent, with a provision that upon the income which has been (1) paid out in dividends during the year, (2) used to discharge indebtedness, or (3) used to purchase bonds of the United States issued after September 1, 1918, the rate is 12 per cent.[1]

Gross income and deductions are substantially as in the case of individuals. It is to be noted that a corporation is allowed to deduct its entire interest paid and is allowed a credit for dividends received from other corporations.

Withholding-at-source applies to income paid to non-resident foreign corporations at 18 per cent, except on interest on "tax-free" bonds, as to which it is at the rate of 2 per cent.

The provisions for payment are the same as in the case of individuals.

Title IV. War Profits and Excess Profits Tax

[Kindly supplied by George E. Holmes]

The excess profits tax law imposed by the act of October 3, 1917, was a tax at graduated rates (unless the invested capital was only nominal) on all the net income in excess of not less than seven per cent nor more than nine per cent of the invested capital plus a specific exemption of $3000 in the case of corporations or $6000 in the case of partnerships and individuals. The act applied to corporations, partnerships, and individuals carrying on any trade, business, profession, or occupation, but not to the income of individuals derived from investments.

The proposed law applies only to corporations. In view of the increased normal and surtax rates upon the income of individuals and partnerships it was considered that in most cases the taxes paid by individuals will be as high as the income and excess or war profits taxes paid by corporations engaged in similar business. Another reason for limiting the tax to corporations was the difficulty of administering the excess profits tax if made applicable to individuals. It is proposed by the revenue bill to levy a tax computed according to whichever of the two following methods will yield the higher amount of tax: (1) the war profits method, or (2) the excess profits method.

The war profits method fixes the pre-war period as the calendar years 1911, 1912, and 1913 (same as the present law) or, if a corporation was not in existence during the whole of such period, then as many of such years during the whole of which the corporation was in existence. Under this method the corporation will be allowed as credits against its net income, a specific exemption of $3000 and in addition, an amount equal to its average earnings for the pre-war period. In case corporations have increased their capital since the pre-war period, only ten per cent of such additional capital will be allowed as a further credit regardless of the rate of earnings in the pre-war period. Similarly, if the corporation has reduced its capital since the pre-war period the credit must be decreased by the amount of ten per cent of the invested capital withdrawn. If a corporation was not in existence during the whole of any one calendar year during the pre-war period, or if it had no net income for the pre-war period, or if its pre-war earnings were less than ten per cent of its invested capital for the taxable year, it will be entitled as a credit, to a specific exemption of $3000 and an additional amount equal to ten per cent of the invested capital for the taxable year. The rate under this method, is a flat 80 per cent of the net income in excess of the credits allowed.

It will be noted that this so-called "war profits method" is not a war profits tax for the following reasons: (1) a minimum exemption of ten per cent is allowed in all cases; (2) only ten per cent is allowed on additional capital put into the business since the pre-war period although the percentage of earnings during the pre-war period may have been more than ten per cent; and (3) new corporations are allowed only ten per cent deduction regardless of what competing corporations in the same line of business may be allowed on their pre-war showing. This method, therefore, does not reach the highly or fully capitalized corporation which made a profit

[1] See, however, limitations contained in the amendment to the second Liberty Bond Act, referred to par. 4 above.

of five per cent on its invested capital during the pre-war period and makes double that profit in the taxable year. The "war profits" method is merely a modified form of the present excess profits tax, in which the minimum deduction is raised to ten per cent and no maximum limit is fixed on the rate of deduction which may be claimed with respect to the pre-war earnings on the pre-war capital, and in which the rate of tax is a flat eighty per cent instead of graduated rates.

The excess profits method is also a modification of the present law. A single rate of deduction, eight per cent of the invested capital, is substituted for the rates of not less than seven per cent or more than nine per cent, and no reference to the pre-war period is required. The specific deduction remains the same, namely $3,000. The rates of the tax remain graduated, but are greatly increased, as indicated below:

> Thirty-five per cent (instead of twenty per cent) of the net income in excess of the deduction and not in excess of fifteen per cent of invested capital;
>
> Fifty per cent (instead of twenty-five per cent) of the net income in excess of fifteen per cent and not in excess of twenty per cent of such capital;
>
> Seventy per cent (instead of thirty-five per cent, forty-five per cent, sixty per cent) of the net income in excess of twenty per cent of such capital.

As in the present law, under neither plan is a foreign corporation entitled to the specific exemption of $3,000.

The provision contained in Sec. 209 of the present law, relating to trades or businesses having no invested capital or merely a nominal capital, is modified in the proposed law, which states that in the case of corporations whose earnings are to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the conduct of the affairs of the corporation, and in which capital is not directly or indirectly a material income-producing factor, a tax of twenty per cent shall be paid on all income in excess of $3,000, in lieu of any other war profits or excess profits tax. However, no corporation is entitled to this low rate of tax if fifty per cent or more of its gross income consists of gains or profits derived from purchase and sale, or of gains, profits or commissions derived from Government contracts, or whose invested capital is more than $100,000. In such cases the tax will be computed according to the war profits method or the excess profits method, whichever yields the greater revenue.

The small corporation is protected by provisions that if the invested capital is not more than $25,000 the tax shall not exceed thirty-five per cent of the net income in excess of $3,000, and that if the invested capital exceeds $25,000 but does not exceed $50,000, the tax shall not exceed forty per cent of the net income in excess of $3,000. This provision, however, will not apply to corporations whose net income exceeds $50,000.

Net income for the purpose of this tax is computed according to the provisions of the income tax law. Oil and gas producing companies are allowed a deduction for depletion of an amount not to exceed ten per cent of the value in the ground of the oil withdrawn during the year, in lieu of the provisions of the income tax law governing such deductions.

The definition of invested capital is changed in several respects. Patents are put in the same class as good-will and similar so-called intangible property. When stock was issued for such property prior to March 3, 1917, only an amount equal to (a) the actual cash value of such property at the time paid in, or (b) the par value of the stock issued therefore, or (c) twenty per cent of the total par value of the stock outstanding on March 3, 1917, whichever is the lowest, may be claimed as invested capital. If the stock was issued after that date no value can be claimed for any such property except patents and copyrights, which are to be valued as in (a) or (b) or twenty per cent of the par value of the stock outstanding at the beginning of the taxable year, whichever is the lowest. When stock is issued for tangible property, invested capital may not be claimed in excess of the actual value thereof at the time paid in or the par value of the stock issued therefor, whichever is the lower. If, however, shares without par value are issued, the fair market value at the time of issuance is deemed to be the par value, and in such cases, it seems, the actual value of the tangible property will ordinarily determine the amount of invested capital to be claimed in respect thereto. Under the present law the Treasury Department permitted the excess of value of tangible property at the time of acquisition, over the par value of

the stock issued therefor, to be claimed as paid-in surplus, but it is not clear that such a ruling can be made under the more positive language of the proposed law.

In other respects the provisions relating to invested capital are substantially the same as in the present law, as construed by the regulations, except that if the corporation chooses to include as invested capital so much of its inadmissible assets (the income from which is not subject to the tax) as equals its permanent indebtedness, it must also include in income a corresponding amount of the income from such assets.

Constructive invested capital was given to corporations under the present law in cases where the Secretary of the Treasury was unable satisfactorily to determine the actual invested capital. The proposed law also specifies that constructive capital shall be given where stock has been issued for a mixed aggregate of tangible and intangible property and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property, or to distinguish the classes of property paid for with stock or with bonds respectively. and also in cases where by reason of the fact that capital employed in the business is in large part borrowed, the invested capital is materially disproportionate to the net income as compared with representative corporations. These provisions, however, will not apply in cases where fifty per cent or more of the gross income consists of gains, profits or commissions derived from government contracts, unless the Commissioner is satisfied that the corporation is over-capitalized.

The present law provides that in case a trade or business was formally organized or reorganized on or after January 2, 1913, the net income and invested capital of the predecessor for the pre-war period shall be deemed to be the net income and invested capital of the present owner. The proposed law contains a similar provision with respect to reorganization, consolidation, or change of ownership after January 1, 1911. A further provision states that in case of reorganization, consolidation, or change of ownership after March 3, 1917, no asset received from the predecessor shall be allowed a greater value as invested capital to the successor than would have been allowed if the asset had not been transferred, if fifty per cent or more of the interest or control of such business remains in the same persons or any of them. A similar provision of the present law applies unless the assets are paid for specifically as such in cash or tangible property.

Under the present law the Treasury Department has required consolidated returns in cases where one corporation owned practically all the stock of another. The proposed law expressly provides that in no case shall the tax be determined on the basis of a so-called consolidated return, but shall in each case be determined on the basis of the net income and invested capital of the corporation liable to the tax.

The provisions of the income tax law as to payment are made applicable to this tax. They have been explained and discussed above in connection with the discussion of the income tax law.

The obnoxious provision of the present law, imposing an eight per cent tax on salaries, is repealed.

PRELIMINARY REPORT OF THE COMMITTEE ON FEDERAL TAXATION OF THE NATIONAL TAX ASSOCIATION

The undersigned committee appointed by the Executive Committee of the National Tax Association, conceiving it to be of immediate importance to secure the views of the members of the Association and such others as might be led to join in the movement on the principal questions involved in the preparation of the pending Federal Revenue Bill, prepared and distributed a questionnaire inviting responses. While the conduct of this inquiry has developed many interesting and valuable suggestions, it is evident that many members have found themselves engrossed in war activities and

otherwise so busily engaged that they have been unable to give the time and attention to the matter as speedily as it was hoped would be the case. The canvass will therefore be continued up to the time of the final report which will be made to the St. Louis Conference to be held November 12th.

In view, however, of the considerable number of carefully prepared responses coming from all portions of the country comprising the views of members thoroughly posted on the subject, and especially in view of the immediate activities of the Congressional Committees in considering pending legislation, it has seemed desirable to issue this preliminary report giving the results of the canvass up to this time.

In presenting this report the committee considers it important to make it as brief and concise as possible, and therefore confines itself to those questions which have been susceptible of an affirmative or negative reply, omitting those involving explanatory or argumentative matter, although many such would be of interest and value were it possible to report upon them. For the same reason it has seemed inappropriate to comment upon such replies as might be done to advantage in bringing out more clearly their meaning and intent and stating any qualifications expressed.

It is assumed that the members of the Association, the Congressional Committees and federal officials may find some value in the mere results of the canvass, in view of the character of those participating.

Replies have been received from 90 members coming from 27 different states, including 22 economists, 39 business men, 10 lawyers, 13 state and local officials. Not all questions were answered by every one, and only those results are given in which a fairly large number of replies were received. From our knowledge of the character, standing and experience in tax matters of those replying, it is believed that the replies may fairly be considered as conveying the general opinion of the country at large upon the questions, many of which are of difficulty and have obviously required no little thought and study.

The committee takes occasion to express its deep appreciation of the co-operation which has been thus extended and of the patriotic and unselfish manner in which the answers have been made.

The questions selected for report with the replies are submitted herewith.

Thomas E. Lyons,
Wisconsin Tax Commission,
Chairman.

Prof. Fred R. Fairchild,
Yale University.

A. E. Holcomb,
American Telephone and Telegraph Co.

George E. Holmes,
Attorney-at-Law.

O. C. Lockhart,
Ohio State University.

September 18, 1918.

RESULT OF CANVASS OF REPLIES TO QUESTIONNAIRE OF COMMITTEE ON FEDERAL TAXATION OF THE NATIONAL TAX ASSOCIATION RECEIVED UP TO SEPTEMBER 19, 1918

	Yes	*No*
Administration		
1. Should there be simplification and a consolidation of the various taxes upon a given taxpayer under one act?	69	7
2. Should regional boards be established at various convenient points throughout the country for the administration of income and profits taxes?	42	20
3. Should such boards be independent of the Treasury Department?	13	27
Income Tax		
4. Should the exemptions of $1,000 and $2,000 be lowered?	32	39
5. Should the entire income above a certain amount be taken as tax?	14	56
6. Should salaries of state officials and income from state securities be taxed (reference was made to the recent cases of *Peck* v. *Lowe* and *U. S. Glue Co.* v. *Oak Creek* in 247 U. S.)?	51	12
7. Should the attempt be made to tax "unearned" income at a higher rate than "earned" income?	44	25
8. Should the income tax on corporations as such be continued (the alternative being to tax the shareholders)?	38	22
9. If practicable, is the taxation of undistributed income justifiable?	31	15
10. Would you advise the insertion of a provision preventing in the future the making of contracts by one to pay the taxes of another? (Applies particularly to "tax free" bonds and "tax free" rentals.)	41	12
11. Should stock dividends be treated as income?	43	27

	Yes	No
12. If the income tax is continued on corporations, should the present provisions taxing dividends received be continued?	7	27
13. In such case also should the limitation on interest deductions be continued?	12	21
14. Should gains from the sale of capital assets be taxed at the same graduated rates applicable to current income arising from the use of capital?	38	21
15. Should steps be taken to promote international comity with respect to taxation of non-resident citizens and corporations and of aliens?	38	11
Profits Tax		
16. Should the present excess profits tax law be continued; *or,*	39	
17. Should a war profits tax based on the British system be substituted?	26	
18. Should an alternative method be provided, the taxpayer to pay the higher amount of tax whether it be computed as an excess profits tax or as a war profits tax?	10	
19. In arriving at the profits tax, should an attempt be made to give some allowance to special industries?	40	2
20. Should the present discriminatory 8 per cent tax on salaries and other "earned" income be retained?	6	44
21. Should the present method of determining "invested capital" be changed?	30	
Excise Taxes		
22. Should the present excise taxes be increased?	28	2
Stamp Taxes		
23. Do you favor stamp taxes on checks?	3	46
24. Should stamp taxes on other documents be imposed?	25	27
Estate Taxes		
25. Do you favor federal estate taxes?	35	21
26. Should the present rates be increased?	15	12
Postal Rates		
27. Do you approve of the existing increased postal rates?	41	18
28. Do you approve of the special postal rates on advertising?	49	15
Customs Duties		
29. Should additional customs duties be imposed?	26	19
30. Should discriminatory duties be levied against enemy belligerents?	12	30
Luxury Taxes		
31. Should taxes on luxuries be imposed?	58	7
32. Should taxes on articles of general use when used as luxuries be imposed?	38	7
Consumption Taxes		
33. Should taxes be levied on articles of general consumption (i. e. tea, coffee, sugar, etc.)?	41	26

CONSTITUTIONAL AMENDMENT IN SOUTH DAKOTA

FRANK T. STOCKTON
Professor of Economics, University of South Dakota, Vermillion, S. D.

As a result of her constitution South Dakota enjoys the general property tax. During the past ten years efforts have been made to alter the constitution so as to give the legislature the power to classify property for purposes of taxation. On three separate occasions tax reform amendments have been submitted to the electorate and each time the voters have refused to make a change. The fate of these proposals should not be taken to indicate that popular opinion in the state holds that the general property tax is the best tax obtainable or even that it gives a fair degree of satisfaction. All the evils of the general tax have been experienced in South Dakota. In particular, money and credits have escaped assessment, as witnessed by the fact that in 1914 the state banks alone reported check deposits amounting to more than $21,000,000 while the assessors succeeded in listing but $8,324,623 in money and credits. The amendments doubtless failed of popular approval because the voters had not been educated to see the justice of classification or because they failed to understand what the proposed changes involved. Hence they preferred to "let bad enough alone".

The South Dakota constitution of today is largely the original instrument of 1889. It contains voluminous restrictions on the taxing powers of the legislature. In the bill of rights, article VI, we find the following:

"Section 17. No tax or duty shall be imposed without the consent of the people or their representatives in the legislature, and all taxation shall be equal and uniform.

"Section 18. No law shall be passed granting to any citizen, class of citizens, or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

Article XI contains the bulk of the constitutional rules on taxation. The leading sections read as follows:

"Section 2. All taxes shall be uniform on all property. . . . The value of each subject for taxation shall be so fixed in money that every person and corporation shall pay in proportion to the value of his, her, or its property. Franchises and licenses to do business in the state, gross earnings, and net income shall be considered in taxing corporations, and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property."

After having made these pronouncements, the constitution, apparently so as to make sure that no guilty corporation shall escape taxation, goes on to repeat itself. Section 3 provides once more that "the power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party." Section 4 further declares that "the legislature shall provide for taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also for the taxing of notes and bills discounted or purchased, moneys loaned and all other property, effects and dues of every description, of all banks and of all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals." Apparently the fathers of the state had a Populistic distrust of corporations of all kinds and proposed to see to it that the people were protected from the crafty corporate tax-dodger.

Other sections of article XI specifically exempt from taxation government property, property used for religious, educational, or charitable purposes, and personal property not to exceed $200 in value for each taxable person. All laws exempting any other forms of property are declared to be void according to section 7. The legislature is authorized to vest the corporate authority of cities, towns, and villages with the power to make local improvements by special taxation of contiguous property or otherwise. All municipal corporations may assess and collect taxes, but such taxes must be "uniform in respect to persons and property within the jurisdiction of the body levying the same." Finally we may note a decidedly obsolete provision of the constitution which applies to the right of the legislature to levy *in 1907* a special tax for the purpose of establishing a twine and cordage plant at the state penitentiary.

The supreme court of the state has held that section 17 of the bill of rights does not, in itself, prevent a classification of property for tax purposes, provided equal and uniform rates of taxation are applied to all persons or property within the same class. The court has ruled, however, that article XI, section 2, "absolutely prohibits any distinction, between classes, in rates of levy, whether such distinction were attempted upon a classification of persons, merely as persons, or upon the difference in ability to pay," since it definitely states that "the value of each subject for taxation shall be so fixed in money that every person and corporation shall pay *in proportion to the value or his, her, or its property*." It has been held that the section does not prohibit progressive inheritance taxes because such taxes are levied upon the right to succession rather than upon property itself. The court has also ruled that classified occupation taxes may be imposed.

Again, it has been held that while the legislature may not tax *property* at different *rates*, it may provide "rules of appraisement and assessment" in carrying out the constitutional requirements for uniformity, equality, and proportion, which need not necessarily result in absolute uniformity, equality, and proportion. According to this language it would appear that the legislature might order personal property to be assessed at 50 per cent of its true value and real property to be assessed at 100 per cent. The tax rate upon both classes of property, however, could not be differentiated. So far the legislature has not experimented with the decision to see whether or not the method of assessment suggested would meet with the court's complete approval when the point was placed squarely before it. The difficulties and

tribulations involved in the administration of such a method in themselves are sufficient to prevent the legislature from trying to establish it. At present the law requires that "all property shall be assessed at its true and full value in money". Needless to say, the law is not well enforced.

At the coming November election the voters of South Dakota will have before them another tax amendment. It is proposed that article XI, section 2, be changed to read as follows:

"To the end that the burden of taxation may be equitable upon all property and in order that no property which is made subject to taxation shall escape, the legislature is empowered to divide all property, includng moneys and credits as well as physical property, into classes and to determine what class or classes of property shall be subject to taxation and what property, if any, shall not be subject to taxation. Taxes may be imposed upon any and all property, including privileges, franchises, and licenses to do business in the state. Gross earnings and net incomes may be considered in taxing any and all property, and the valuation of property for taxation purposes shall never exceed the actual value thereof. The legislature is empowered to impose taxes upon incomes and occupations, and the taxes upon incomes may be graduated and progressive, and reasonable exemptions may be provided."

The amendment clearly establishes the right to classify property and to impose occupation and income taxes. It changes that part of the constitution which has so far caused practically all the trouble by holding the state to the general property tax. However, certain matter remains which is contradictory to the language of the amendment. For example, one untouched section, mentioned above, provides that all exemptions from taxation, other than exemptions of government property, the property of religious, educational, and charitable bodies, and personal property not to exceed $200 in value for each taxable person, are void. According to this rule it would be unconstitutional to exempt money and credits, but according to the proposed amendment these items might be freed from taxation. Another section provides that the right to tax corporations shall not be suspended or surrendered. Under the amendment, however, the legislature would appear to have the right to suspend the taxation of such property holders. It is true that an amendment, as the latest expression of the people's will, takes precedence over any older part of a constitution. But it would be much more satisfactory and business-like to amend the constitution in such a way as to eliminate all contradictions, thus making it a unified instrument.

The suggestions made by the state tax commission in its first biennial report, issued October, 1914, are quite in line with the ideas of the present writer. The commission not only recommended that article XI, section 2, be changed as now proposed, but also that the phrase "and all taxation shall be equal and uniform" be stricken from section 17 of the bill of rights, that section 18 of the same article be entirely omitted, that sections 4 and 7 of article XI be dropped, and that the maximum exemption of $200 on personal property be disposed of. The commission might have gone further in suggesting that the obsolete matter referring to the special levy of 1907 be done away with. There is no reason why the people of South Dakota should be content with a patched-up constitution. While they are putting new timbers on their legal house they might as well make a clean job of it by clearing out all the rubbish and discarding the surplus lumber at the same time. Perhaps the proposers of the present amendment felt that if they were to suggest to the people that a comprehensive reform be undertaken the voters might get the idea that their whole constitution was in danger of abolition.

The proposed amendment appears to have little chance of adoption. About a dozen other amendments along various lines are to be submitted at the same time. The confusion caused by this condition of affairs is likely to cause a "no" vote on all propositions. A constitutional convention would doubtless be a good place to clear up the basic laws on taxation as well as those on other matters. In various places the present constitution contains much statutory detail. Such a convention does not appear imminent. The immediate outlook for any kind of tax reform which will head the state away from the general property tax is not a bright one.

NOTES AND NEWS ITEMS

FEDERAL TAX INVESTIGATIONS

The summer has been marked by much study and discussion of federal taxation by numerous bodies, official and non-official. Besides various communications from the Treasury Department, the record of the Hearings before the Ways and Means Committee on the new revenue bill, and the interesting report of the Committee accompanying the bill, questionnaires have been sent out and suggestions offered by several organizations.

The efforts of the National Tax Association committee on federal taxation have been described elsewhere.

The Chamber of Commerce of the United States has conducted an inquiry by means of a questionnaire and referendum vote. The questionnaire was accompanied by an interesting report containing recommendations, all of which were accepted in the referendum by large majority votes. The following are the recommendations made:

1. That exemptions allowed before war taxes are imposed should be adequate for the safe conduct of business enterprises and that power to make adjustments that will prevent inequities should be given to the administrative authority under the tax law.
2. That liberal provisions for amortization of plant used upon war work should be made, with opportunity for subsequent readjustment to correct errors.
3. That there should be a limited number of regional boards of review, appointed by the administrative authority and making recommendations upon appeals from preliminary assessments.
4. That there should be equalization of federal taxes.
5. That in computing taxable income corporations should be allowed to make two deductions (interest and charitable gifts) which they are now denied.
6. On condition that proper exemptions and opportunities for adjustment are allowed, that a war profits tax should be imposed at a high rate, and should be levied when it would exceed the excess profits tax.
7. That, upon the present general basis, but with inequalities removed, the excess profits tax should be increased.
8. That rates of income taxes should be increased and unearned incomes should be taxed at least as much as earned.
9. That heavy taxes be levied upon a few articles of widespread consumption.
10. That heavy taxes be levied upon a selected list of luxuries.
11. That heavy taxes be levied upon a selected list of war extravagances.

A committee of the National Association of Credit Men has issued a brief which criticizes certain features of the present income and excess profits taxes, the argument supported by an elaborate chart and illustrative tables. The brief recommends, among other things, equal treatment of partnerships, corporations, associations, and individuals, an additional flat income tax of $5 upon all incomes over $800, equal treatment of earned and unearned incomes, and that the excess profits tax apply only to earnings in excess of pre-war earnings.

The committee on taxation of the Investment Bankers Association of America has likewise conducted an inquiry among the members of its association and made a report criticizing the present income and excess profits taxes and recommending, among other things, that care be taken not to tax capital in the guise of income, that income should be taxed as of the year in which it accrued, that stock dividends be not taxed as income, that individuals, partnerships, and corporations be treated on a parity under the income tax, that borrowed money be treated as capital, and so forth.

The Civic Federation of Chicago has issued a bulletin making certain suggestions; i. e., that a scientific budget of expenditures be introduced, that taxes should be made to produce one-third of the needed revenue, that war profits should be distinguished from excess profits and taxed at a higher rate, that salaries of public officials be subject to income tax, and that the present discrimination against income from salaries, fees, and so forth, be repealed.

We regret that lack of space forbids fuller accounts of the foregoing reports. Exact reference to all of these publications will be found in the department of *Recent Publications*.

MANITOBA TAX COMMISSION

Notice has been received of the appointment of a special commission to inquire

into various tax matters in the Province of Manitoba. One of the commissioners, well known to members of the National Tax Association, is the Hon. L. W. Donley, Assessment Commissioner of the city of Winnipeg.

SOUTH DAKOTA TAX STATISTICS

We have received from Mr. T. A. Polleys, Tax Commissioner of the C. & N. W. Ry., some interesting figures comparing the assessed value and the estimated true value of land and the assessed value of personal property in 17 counties and 93 cities and villages of South Dakota.

William W. Beck has been appointed a member of the Maryland State Tax Commission to succeed Lewin W. Wickes, who has been a member since the organization of the commission in 1914.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

NOTE.—Readers may not have noticed that in the table of cases covering vols. I–III, which was distributed with the June BULLETIN, the permanent citations are given, making this index available for permanent reference.—A. E. H.

FEDERAL AND STATE INCOME TAXES

STATE AGENCIES.—In view of the widespread discussion of the provisions of the pending revised federal income tax law, imposing such tax upon the salaries of state officers and upon income from state securities, it is of interest to refer to two recent decisions of the United States Supreme Court, noted in the June BULLETIN, which seem to bear upon the question. In *Peck* v. *Lowe*, upon which we commented at length, the federal income tax, levied upon that portion of the net income of a taxpayer derived wholly from the business of exporting, was held not repugnant to that clause of the federal constitution prohibiting a tax on exports, because being a *net* income tax, and all expenses being deductible, there could be no direct burden upon the profits from exports. The decision in *United States Glue Co.* v. *Wisconsin Tax Commission* was merely mentioned. The question presented was whether a state, in levying a general income tax, might include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause. It is to be noted that the court does not at once dismiss the question with the statement that a state may not burden interstate commerce by *any* sort of a tax, but they examine the particular tax in question to see if in fact it constitutes a burden in the sense prohibited. The familiar doctrine is asserted that a state may not directly burden interstate commerce, but it is observed that a tax that only indirectly affects the profits or returns from such commerce is not within the rule; that it is obvious that a tax upon property used in interstate commerce, admittedly perfectly lawful, must be paid from net income and thus diminish it in the same sense as a tax directly upon such income. The difference between a direct and an indirect burden is emphasized and the correct distinction stated to be well illustrated by the decisions in the two cases of *Crew Levick Co.* and *Peck* v. *Lowe* (BULLETIN, III, pp. 99 and 245). In the first case the tax was upon the gross income from foreign commerce and was held illegal, while in the latter it was levied under the 1913 federal income law upon the *net* income from such commerce and was held valid. The court proceeds:

"The difference . . . is manifest and substantial and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. . . . A tax upon the net profits has not the same deterrent effect. . . . Such a tax when imposed upon net incomes from whatever source arising is but a method of distributing the cost of government, like a tax upon property, . . . and if there be no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for its enforcement, it constitutes one of the ordinary and general burdens of government, from which persons and corporations, otherwise subject to the jurisdiction of the states, are not exempted by the federal constitution because they happen to be engaged in commerce among the states. . . . And so we hold that the Wisconsin income tax law, as applied to the plaintiff . . . cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an

unconstitutional interference. . . . It was measured not by the gross receipts but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations . . . are taxed . . ."

It is difficult to see why the reasoning of these two decisions, and particularly the language quoted, are not applicable to the matter in hand. As to both the state salaries and the income from state securities, there is no discrimination. This income is merely included with all other income as measuring the ability of the subject to respond to a general obligation imposed upon all. Furthermore, it is *net* income which is taxed; expenses are deducted, making the tax decidedly free from the objections which might be urged if it were levied upon gross income. Such a tax, falling upon the general *net* income of one deriving such income in part from a state salary or from interest on a state security, cannot be said to impair the "essential rights of a state" or to tax a "necessary instrument for carrying on a state government". Under this view, no claim is made that the 16th Amendment created new *powers* of taxation. The position is that the power to place a general income tax upon *net* incomes always existed. The whole question is as to the manner of use of that power.

The language of Justice White in his dissenting opinion in the *Pollock* case is most pertinent. He was quite evidently thinking of the *effect* of the tax and not only of the meaning of "direct" in its constitutional sense, when he wrote:

"It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response."

It is true that he agreed that the tax on state bonds was invalid because, as he said, his judgment was concluded by prior decisions, and because there was no power to tax them either directly or indirectly; but it is significant and highly interesting that he concurred in the result only in the *instant* case. He may have been mindful of his observations in the *Pollock* case above quoted and hesitated to give full approval to the reasoning of the Court, although that this decision can really be thought to turn upon the degree of indirectness of the tax, seems rather narrow ground upon which to stand, for the burden upon the states arising from the tax is insignificant, as has been pointed out by Professor Seligman (*Income Tax*, 2d ed., 604). We are unfortunately left in doubt as to the real views of Justice White in the *instant* case. These decisions will appear reported in 247 U. S.

The recent decisions of the United States Supreme Court of June 3 (247 U. S. —), briefly mentioned in the June BULLETIN (p. 248), clear up some points which have long been in dispute. They have been carefully followed in the revision now pending in Congress. A digest of them, as well as of the previous decisions on points arising under the corporation excise tax of 1909, also noted in the June BULLETIN (p. 243), is to be found in *T. D. 2740*, issued June 24. This digest provides the authorized interpretation of the decisions for the guidance of taxpayers.

In *Houston Belt &c. Ry. Co.* v. *United States*, 250 Fed. 1, it is held that interest on the indebtedness of a corporation, paid by other companies which owned its entire stock, was income of such corporation, although the other corporations were directly liable to the mortgagee.

In *United States* v. *N. C. & St. L. Ry.*, 249 Fed. 678, the word "false" in subdivision 5 of sec. 38 of the corporation excise tax law, in the provision providing for a new assessment in case of "false" or "fraudulent" return, and for the recovery of additional taxes, is construed to mean untrue or incorrect and not necessarily intentionally or fraudulently false; and that, independent of the provision in question, an action may be maintained for additional taxes in such cases after the time the commissioner is authorized to amend a return, pursuant to sec. 3213, Rev. St.

The MONTANA corporation income tax (Ch. 79, Laws 1917), construed and held to be a license or excise tax for the privilege of doing business, following the theory of the U. S. corporation tax of 1909 as construed in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. The fact that insurance companies are also subjected to license taxes under a prior law does not render this act invalid as involving double taxation or imposing unequal burdens. The deduction of taxes in computing net income by companies doing business wholly within the state as compared with those doing business elsewhere as well, considered and held not discriminatory. — *Equitable Life Assur. Soc.* v. *Hart*, 173 Pac. 1062.

The MISSOURI supreme court has upheld the validity of the income tax law passed in 1917, on all points. The opinion is not yet available for reference, but the chief point upon which the decision turned was as to whether the tax was a property tax. If so, it was claimed to be invalid because unequal. The court had no difficulty in determining that the tax is not a property tax but an excise, following and approving the decision in *Glasgow* v. *Rowse*, 43 Mo. 479. (See June BULLETIN, p. 244).

VALUATION—UNIFORMITY

Further approval of the doctrine elaborately discussed and announced in the *Ky. Franchise Tax Cases* (see BULLETIN, III, p. 54), that all assessments, however made, must be upon an equal basis, is found in a recent decision by the U. S. Supreme Court in a Michigan case which is also important because of its disposal of the claim that this doctrine means discouragement to the efforts now being made everywhere to improve the quality of assessment work.

In the case in question the court, as a matter of fact, denied the relief sought by the complaining taxpayer whose assessment had been very greatly increased by the state board, holding that the inequality must arise through intentional and arbitrary discrimination, whether by a statute or by its improper execution; that there must be something like an intentional and systematic undervaluation of property other than that of complainant; that errors of judgment will not support a claim of discrimination. In the instant case the court expressly recognizes the fact that the state board was making an honest effort, in new and difficult circumstances, to adopt valuations not relatively unjust or unequal and could not be chargeable with any purpose or design to discriminate. For these reasons the relief was denied, though the court observes that the facts disclosed rendered it "more than probable" that plaintiff's property was assessed for the particular year in question (but not before or since) relatively higher than other lands, although the statute enjoined the same rule for all.—*Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S.

TIDE LANDS which might be said to have a large value because the owner might force the upland owner to pay a great price for them cannot be said to have such value where the tideland and upland are owned by the same person and no such exceptional value exists as a matter of fact. Assessments must be equal and uniform with other like property.—*East Aberdeen Land Co.* v. *Grays Harbor County*, 172 Pac. 876.

In a recent TEXAS case, it is stated to be "well settled" in that state that a taxpayer may resort to injunctive relief against an assessment which is discriminatory and arbitrary and in excess of the rate of assessment placed upon other property.—*Sweetwater* v. *Biard Development Co.*, 203 S. W. 801.

RAILROADS.—Under a MARYLAND statute providing that the real property of railroads shall be assessed in the same manner as that of individuals, it was not illegal to consider the utility value for railroad purposes of certain lots or parcels of land owned by a railroad, because if owned by individuals, such elements would be proper to consider in assessing them. — *Northern Cent. Ry. Co.* v. *Baltimore*, 104 Atl. 44.

CAPITAL STOCK.—An act of OKLAHOMA provides that corporations shall be assessed upon the "net value of their moneyed capital, surplus, and undivided profits . . . less the assessed valuation of any real estate," and "moneyed capital" is defined as including "money actually invested in the business whether represented by certificates of stock, debentures, or bonds." It is held that this means an assessment upon

all the assets, money and property of the company at their actual value and that the phrase "net value" does not authorize the deduction of indebtedness or, in the instant case, of the reserves of an insurance company.—*In re Oklahoma Nat. Life Ins. Co.*, 173 Pac. 376.

FRANCHISES

The intricacies of the NEW YORK Special Franchise Tax law appear unending. It has just been determined, apparently for the first time, though the statute was passed in 1899, that a taxpayer is not assumed to know how to value franchises, and hence, upon review by the court, is not compelled, as in the case of ordinary property having an ascertainable value, to state their value and the amount of overvaluation claimed. So held in dismissing motion to quash writs of review.—*L. I. R. R. Co.* v. *State Board of Tax Commissioners*, 171 N. Y. Supp. 784.

FEDERAL AGENCIES. — The *New York* court of appeals has affirmed the decision of the court below in the *Postal Telegraph* case, holding that the assessment made upon its franchises was not invalid as including franchises granted by the federal government by the Post Roads Act. Full discussion of the cases is made and it is held that the two franchises exist; that the one granted by the state is taxable; and it will be presumed that the federal franchise is not included in a total assessment, for to assume the contrary would render the statute invalid. — *People ex rel Postal Tel. Cable Co.* v. *State Board of Tax Commissioners*, 169 N. Y. Supp. 139 (see BULLETIN, II, p. 231, and III, p. 208).

LAND. — On Broadway in the city of NEW YORK the uneven and unequal method of improvements make the desirability of each plot a matter of circumstances and there can be no fixed unit of value. In such cases the values obtained for other properties are not a dependable criterion and opinions based thereon have no great weight. A more satisfactory method is to take the property as a rent-producer. A capitalization at five per cent was held more appropriate than four per cent as contended for by the city.—*People ex rel N. Y. Title & Mort. Co.* v. *Purdy*, N. Y. L. J., July 19, 1918.

SITUS

INTANGIBLES. — A case of considerable interest as inaugurating a reversal of the usual rule, is one in which a resident of the state (Kansas) was held not taxable for intangible property held for him for investment and reinvestment by a resident of another state, on the theory that having acquired a "*business situs*" in such other state, it was beyond the jurisdiction of the state in question.—*Buck* v. *Board of Commissioners*, 173 Pac. 344.

INTANGIBLES. — The fiction of situs at domicile must give way in the face of contrary facts. A state may assess property of a non-resident decedent in the hands of a resident executor having absolute and exclusive control thereof, upon the theory of "*business situs*". The right of one state to tax property does not depend upon the action of another state.—*In re Thourot's Estate*, 172 Pac. 697.

TANK CARS. — A statute giving authority to assess rolling stock of foreign corporations doing business in the state, does not authorize the assessment of rolling stock owned by a foreign corporation but leased to and operated by domestic corporations, the owning corporation not having an office or agent within the state, the leases being made in another state and rentals paid there. Further, the assessment of such rolling stock in one parish, whereas the cars are distributed over the railroads of the state. is unauthorized in the absence of a statute fixing a situs. — *Union Tank Line Co.* v. *Day*, 79 So. 334.

INHERITANCE TAX

DEDUCTION OF FEDERAL ESTATES TAX. —Criticism has been widely expressed of the federal estates tax in that it falls wholly upon the residuary legatee, and it is urged that it should be changed so as to constitute a true tax on successions and be a charge upon each beneficiary. A recent decision of the Surrogate of New York County announces the interesting rule that the tax should be deducted proportionately from each legacy instead of from the residuary legacy, like other expenses of administration. The will was silent on this point and it was held that the question should be decided on principles of equity

and justice.—*Estate of Douglass*, N. Y. L. J., Aug. 7, 1918.

The MISSOURI inheritance tax law of 1917 has recently been upheld at all points in an exhaustive opinion going into the entire subject and far beyond those points necessary to a decision of the case. It is held, for instance, that the taking by will is not a natural right but may be granted upon condition; that the state may foreclose the right absolutely; that the inheritance tax is not strictly a tax but an exercise of sovereignty; that the inheritance tax law may amend or repeal the laws of descent and distribution where inconsistent with them; that the act does not violate the "due process" or "equal protection" clauses or the clause providing that taxes may be levied for public purposes only or the "uniformity" clause. — *State* v. *Guinotte*, 204 S. W. 806.

Under the IOWA statute, a saving bank deposit represented by a passbook in his possession and a negotiable certificate of deposit owned by a decedent non-resident, kept in his possession outside the state, are subject to the collateral inheritance tax. Full discussion of the leading cases is made.—*Hoyt* v. *Keegan*, 167 N. W. 521.

REGISTRATION AND SECURITIES TAXES

The MARYLAND classified tax law on intangibles has recently been held not to apply to certificates of deposit or bank deposits generally, although the statute uses the language "all bonds, certificates of indebtedness or evidences of debt in whatsoever form made or issued". The decision is based wholly upon the long-continued interpretation by the assessing officers that such deposits were not taxable. — *Mayor &c.* v. *Machen*, 104 Atl. 175.

In the OKLAHOMA insurance tax case, elsewhere noted in this issue, the constitutionality of the mortgage registration tax is incidentally passed upon and held not repugnant to the constitutional prohibition against exemptions other than those permitted in the constitution, or to the provision that all property shall be assessed at its fair cash value. It is held that the registration tax is a substituted method of taxation permitted by the constitution and not an exemption.

Of further interest in this case is the holding that as the registration tax law provides that mortgages shall be exempt from all other taxation, a corporation subject to tax on its capital is entitled to have a deduction to the amount of mortgages owned upon which the registration tax has been paid.—*In re Oklahoma Life Ins. Co.*, 173 Pac. 376.

In *In re Von Bernuths' Estate*, 171 N. Y. Supp. 764, it is held that the tax of five per cent on investments found in a decedent's estate, upon which the state registration tax has not been paid, may not be defeated by showing that the decedent was taxed a certain amount in the year in question. It must be shown what property was actually assessed in the lifetime of the deceased.

RECENT PUBLICATIONS

ARNOLD, SYDNEY. A capital levy: the problems of realization and valuation. *The Economic Journal*, XXVIII, 110 (June, 1918).

Discusses practical aspects of the proposal.

BOGART, ERNEST L. Direct costs of the present war. New York. Oxford University Press. 1918. 43 p. (Carnegie Endowment for International Peace. Preliminary economic studies of the war, no. 5.)

The author has collected from various sources, official and otherwise, the important figures of expenditures, revenues, and loans of the belligerent nations, covering the period from the beginning of the war to the close of the year 1917. This report will mean a great saving of time and labor to all who have occasion to use these facts.

BRIEF OF THE NATIONAL ASSOCIATION OF CREDIT MEN. Chairman, R. G. Elliott, Jacques Manufacturing Company, Chicago, Ill. 6 p. tables. charts.

See comment elsewhere in this issue.

CHAMBER OF COMMERCE OF UNITED STATES OF AMERICA. Referendum no. 25 on the report of the special committee on financing war. Riggs Building, Washington. July 13, 1918. 23 p.

See comment elsewhere in this issue.

CHICAGO CIVIC FEDERATION. Suggestions as to federal taxation. Chicago, Ill. Bulletin no. 25 (August, 1918). 1918. 2 p.

See comment elsewhere in this issue.

CHICAGO CIVIC FEDERATION. Arguments for a state tax commission. Chicago, Ill. Bulletin no. 26 (August–September, 1918). 1918. 2 p.

A clear and forcible statement. This is one of an interesting series of bulletins, most of which, however, deal with matters other than taxation.

CORPORATION TRUST COMPANY. The $8,000,000,000 revenue bill. 37 Wall Street, New York City. Bulletins 1 and 2. Series of 1918. 19 p. and 11 p.

These are the first of a series of bulletins which will be extremely useful to those who wish to follow carefully the progress of the revenue bill. They consist of careful and detailed analyses of the original bill as drafted by the Ways and Means Committee (Bulletin 1) and the bill as passed by the House (Bulletin 2).

CRAMMOND, EDGAR. British finance during and after the war. *The Quarterly Review*, vol. 230, no. 456 (July, 1918).

Offers some suggestions for the British tax program during the reconstruction period.

GEORGIA. Fourth annual report of John C. Hart, State Tax Commissioner, for the year 1917. 15 p.

GRAHAM, BENJAMIN. War taxation and cash position of industrials. *The Magazine of Wall Street*, vol. 22, no. 8 (July 20, 1918). 1918. p. 541-545.

Shows the decreasing ratio of cash to other items in the balance sheet, and the danger of still further difficulties due to increased war taxes.

GUARANTY TRUST COMPANY. The effect of the war on railroad securities. New York. Guaranty Trust Company. 1918. 8 p.

GUARANTY TRUST COMPANY OF NEW YORK. Facing our war finance problem. New York. 140 Broadway. June 7, 1918.

Brief discussion of the present situation in the United States, with a comparative account of the financing of the Civil War.

HOOK, A. A tax on capital and redemption of debt. *The Economic Journal*, XXVIII, 110 (June, 1918).

Deals with the proposal, recently put forward by the British labor party, for a special tax or levy on capital as the best method of retiring the immense war debt. Hook thinks that it would have a conciliatory effect upon the relations between labor and capital and would probably be more favorable to the industrial capitalist than an income tax, because of the relatively higher incomes of this class.

INVESTMENT BANKERS ASSOCIATION. Report of committee on taxation. *I. B. A. of A. Bulletin*, VI, 9 (August 1, 1918). 1918. p. 142-145.

See comment elsewhere in this issue.

KANSAS. State Tax Commission. Revised instructions to be observed in the assessment and equalization of property, both real and personal, for the purposes of taxation. 1918. 136 p.

This is the latest revision of the excellent assessors' manual which the Kansas tax commission has developed. The principal change, other than those made necessary by new legislation, is in the form of the manual. The method of question and answer which has characterized the earlier editions has been eliminated and the direct statement substituted, although most of the material is given in response to questions that have been asked.

MISSOURI. Abstract of the report of the state tax commission of 1901-3 with recommendations for revision of revenue laws of Missouri. State tax commission. 8 p. 1918.

MISSOURI. First annual report of the state tax commission to the state board of equalization assessing the property of the railroads, street railways' rolling stock, telegraph, telephone, and bridge companies. Tax commission. 1918. 12 p.

The commission found that all but five counties and the city of St. Louis had assessed property in substantial compliance with the law. The delinquent districts were brought to an equalized value as determined by the average basis of valuation in the remainder of the state. The commission's figures met with the fate that is to be expected when they are reviewed by a separate state board of equalization, which equalizes without scientific study. Thus the assessors returned money, notes, and bonds to the amount of $174,889,000 and the tax commission equalized this class of property at $203,933,000. The state board equalized it at

$110,990,000. Other equally high-handed reductions were made. The separate state board of equalization is, in Missouri, not only a superfluous, but a harmful institution.

MISSOURI. Second annual conference of the assessors of Missouri with the state tax commission, May 20, 1918. Tax commission. 1918. 62 p.

Chiefly an experience meeting without a set program. The members of the state board of equalization snubbed the commission in ignoring invitations to attend the conference.

NEVADA. Tax commission law. Statutes of 1917. p. 328.

This is not a model tax commission law.

NEWCOMER, MABEL. Separation of state and local revenues in the United States. (Columbia University Studies in History, Economics, and Public Law, LXXVI, 2.) 1917. 195 p.

A historical study of the tendency to separation of state and local revenues in the states of Delaware, Pennsylvania, New York, Connecticut, New Jersey, Vermont, West Virginia, and California.

NEW JERSEY. Annual report for 1917 of the state board of taxes and assessment. Parts II and III. 1918.

Part II deals with the details of the assessment of railroads and canals, and Part III with the assessment of miscellaneous corporations.

NEW YORK STATE. Tax Bulletins. State Tax Department. 1918. III, 1-4 (March to June, 1918).

No. 1 (March) emphasizes the importance of equalization and discusses the law governing appeals from the action of the local equalizing authorities. 18 p.

No. 2 (May) outlines the changes in assessment procedure under the amended tax law. 5 p.

No. 3 contains the tax law of the state of New York with the 1918 amendments. Fully indexed. 722 p.

No. 4 (June) is a separate issue of the law providing for a franchise tax on manufacturing and mercantile corporations, with some annotations. 18 p.

NOYES, C. REINOLD. Fallacies of war finance. *The Yale Review*, VIII, 1 (October, 1918), 72-89.

Puts some sound ideas into popular language and attacks certain common misconceptions.

THE NATIONAL TAX ASSOCIATION

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THE CONFERENCE

The regrettable necessity of calling off the conference, of which members have been notified by mail, is now a thing of the past. Our immediate concern is to decide whether we shall abandon this conference altogether and content ourselves with publishing the volume of papers or hold a conference as soon as conditions in St. Louis and throughout the country make it comfortably possible to do so. The majority of the members of the Executive Committee feels that a conference should be held. Members of the Association, writing independently, have in many cases assumed that it would be held, and some have stated emphatically that a conference is of the utmost importance at this time.

On the whole, the officers have been led to feel that the conference should be held, even at a definite sacrifice of time and convenience on the part of members and delegates.

The entire program scheme suggests naturally that the place originally selected be adhered to. We are therefore awaiting with interest the receipt of the latest views of our Missouri and St. Louis friends who have been so energetic in promoting the plans.

Naturally the approach of the holidays, the assembling of the various state legislatures, and the general congestion of official duties in the closing weeks of the year all obviously make it difficult to fix a date satisfactory to everyone. It does not seem to be of particular moment if the conference is carried over into 1919, thus bringing two conferences in one year. While it is an annual event, the purposes are not associated with the calendar year.

With these considerations in view, the officers are seeking the views of the greatest possible number of members, in particular of the various state taxing officials. It is regretted that time will not permit of correspondence with every member and every delegate. It will be most helpful if members generally will indicate their views by writing to the Treasurer (195 Broadway, New York City), who will assemble the views and announce the result.

To facilitate the matter it is suggested that if conditions are otherwise satisfactory, a week early in December might be selected, or possibly one in the first half of January before legislative matters become absorbing. If these dates cannot be used, it seems necessary to let the matter go over until February.

TAXATION OF PUBLIC SERVICE CORPORATIONS IN THE STATE OF NEW YORK

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PART I

Public service corporations generally have become liable to the application of special tax laws which are not found in connection with other forms of property. Three reasons may be given for this situation: rapid growth in extension and power of public utilities, the change in the attitude of the public towards their nature, and the inability of existing methods of taxation to reach their property values.

Every one is familiar with the leniency and favor shown to early public utilities. Not only were franchises freely given, but the companies were subsidized by financial assistance, land grants, and so forth. Often these companies were immune from laws which affected other corporations. This was particularly true with tax laws, and the statutes of New York furnish numerous examples of this attitude. In the tax law passed in 1823 [1] there were provisions which the court held applied to all corporations without exception.[2] Legislation in 1825 [3] sought to relieve turnpike, bridge, and canal companies by providing that, if the net income did not exceed five per cent on the capital stock, the property taxes might be commuted by paying five per cent of the entire income directly to the county treasurer. Legislation in 1827-28 [4] was even more favorable. Provision was made that if the net income of these companies did not exceed five per cent of the capital stock they were to be exempt from taxation. In 1853 a law [5] which imposed a uniform corporation tax system was passed, but almost immediately concessions were made to turnpike companies. Many other examples from New York might be given, while a study of public utility development in other states shows the same attitude.

The leniency which was granted to the public utilities no doubt had much to do with the rapid building up of these enterprises. The time came, however, when the idea that special immunities should be granted was no longer in vogue. The public was awakening to the fact that it was being exploited by a number of companies that had been granted gratuitous long-time or perpetual franchises without protecting the public interest. A franchise, it began to appear, no longer primarily conveyed the idea of service to the public, but that a right had been given to exploit the public. When the people began to realize the value of these rights which they had so lavishly bestowed and turned to correct the evil they had brought upon themselves, no weapon seemed so readily available as increased taxation. The first step was to abolish any special favors or immunities and to attempt to apply the existing tax laws to public utility property.

Present System for Taxing Public Utilities

The application of the general tax laws, it soon became evident, was not accomplishing all that was desired. The reports of the state comptroller and the state assessors as well as newspaper articles became increasingly unfavorable to the system. The special tax commission which reported in 1871 [6] pointed out in no uncertain language the injustice and discrepancies which existed. It was a difficult matter, however, to convince New York legislators that changes in tax laws might be beneficial and no modifications were secured until

[1] *New York statutes*, 1823, ch. 262.

[2] 4 *Cowen*, 556.

[3] *New York statutes*, 1825, ch. 254.

[4] *New York statutes*, 1827, ch. 9, and *Revised Statutes*, ch. 13, title 4, sec. 11-12.

[5] *New York statutes*, 1853, ch. 654.

[6] The report of this commission is given in *Assembly Documents*, 1871, vol. 3, no. 39. The personnel of the commission was David A. Wells, Edwin Dodge, and George W. Cuyler. The report gives a thorough treatment of the New York tax system at that time.

1880. In that year public utility companies were classified and the previous method of taxing their personal property for state purposes was practically abolished.[7] The laws of 1880, with the additions and modifications made in 1896,[8] constitute the general scheme by which public utilities as well as other classes of corporations are taxed at present.

All public utility companies, except elevated railroads, surface roads not operated by steam, and those companies formed for supplying water or gas, for electric or steam heating, lighting or power purposes, are subject to the annual franchise tax on capital stock. This is a franchise tax applicable to corporations in general, except manufacturing companies, and varies according to dividends, assets, liabilities, etc. A tax known as the additional franchise tax, which exacts an annual tax of 0.5 per cent from gross earnings, applies to all steam surface roads, all canal, steamboat, ferry, express, navigation, pipe line, transfer baggage express, telephone, telegraph, and palace sleeping car companies. The earnings considered are those arising from business originating and terminating within the state; hence earnings from interstate commerce are not included. The additional franchise tax applies also to companies formed for supplying water and gas, or for electric or steam heating, lighting or power purposes. In addition, however, these companies must pay a tax of three per cent on dividends declared in excess of four per cent on the actual amount of paid-up capital. An annual gross earnings tax of one per cent on business arising within the state is exacted from companies owning or operating elevated railroads or surface roads not operated by steam. They also must pay the three per cent tax on dividends in excess of four per cent.

These taxes, which are all for the state, are in lieu of all other taxes for state purposes on personal property. The companies are, however, assessed and taxed locally; the real estate at situs and the personal property at the place of the principal office. Since the state levies a small direct tax, a part of the locally collected tax is used for state purposes. The state rate can only be levied on the real estate values of corporations since the taxes enumerated above are designated by law as the only taxes on personal property for state purposes.

Besides the taxes assessed and collected locally for local purposes, there is a central assessment for local purposes. This is the special franchise tax and because of the origin and novelty of the scheme it deserves special treatment. Unlike other taxes, it was proposed and passed with practically no agitation from the public. Although Senator John Ford was sponsor for the statute, the man primarily responsible for its passage was Theodore Roosevelt, then governor of the state. In his first message to the legislature [9] he condemned the existing tax system in general terms, but in a subsequent special message he committed himself to a more definite policy. He said in part:

> "It is true that a corporation which derives its powers from the state should pay to the state a just percentage of its earnings as a return for the privilege it enjoys. This should be especially true for the franchise bestowed upon gas companies, street railways, and the like. The question of municipal ownership of these franchises cannot be raised with propriety until the governments of all municipalities show greater wisdom than has been recently shown in New York City. . . . I need not point out that in foreign communities a very large percentage of the taxes come from corporations which use the public domain for pipes, tracks, and the like. Whether these franchises should be taxed as realty; or whether it would be wiser to provide that, after the gross earnings equal, say, 10 per cent of the actual original cost, then five per cent of all earnings over and above this shall be paid into the city treasury; or whether some yet different plan should be tried can only be settled after a careful examination of the whole subject. One thing is certain, that the franchise should in some form yield a moneyed return to the government." [10]

It is evident from the wording of this message that the governor did not consider the existing taxes as yielding a sufficient money return from the franchises. Soon after the above message was read Senator Ford introduced his bill for taxing franchises, which passed the Senate without delay, 33 to 11. It would be beyond the scope of this article to trace the history of the bill before it was finally placed on the statute books, May 26, 1899.[11] Suffice it

[7] *New York statutes*, 1880, ch. 542.

[8] *New York statutes*, 1896, ch. 908.

[9] *Governor Roosevelt's message*, January 4, 1899.

[10] *Governor Roosevelt's special message*, March 27, 1899.

[11] *New York statutes*, 1899, ch. 712.

to point out that, because of the opposition which developed in the assembly, the governor found it necessary to send two mandatory messages in order to secure its passage, which came on the last day of the session. Because of the defects which were pointed out, he refused either to sign or veto the bill, but called a special session of the legislature to adopt amendments which he considered necessary. In spite of the hostility of the legislature because of the methods used, the amendments were passed, since it was evident that they were an improvement. The governor had made it plain that he would sign the bill as it was before him unless the legislature adopted his wishes. That he took upon himself the credit for the law is evident from subsequent utterances.[12] The press was generally favorable to the principles embodied in the law, the *New York Times* being an important exception.

The provisions of the law are substantially as follows: Under the term real estate is included the value of all franchises, rights or permissions to construct, maintain, or operate in, under, through, or above the streets, highways, or public places. These rights are "special franchises" and are further defined so as to include the value of tangible property situated in such places and used in connection with a special franchise. Each special franchise is assessed annually by the board of state tax commissioners and the value certified back to the clerk of the assessment district where the franchise is located. All the determinations by the commission are subject to court review. Difficulties have made it necessary to modify the original law so that uses of highways, etc., less than 200 feet in length outside of incorporated villages are not considered special franchises. Special franchise values are now equalized with the assessed value of other real property in the district.

One important feature of the law is its definition of special franchises as real estate. This was made necessary by the wording of the general tax law. Debts could be deducted or "sworn off" from personal property assessments but could not be deducted from real estate assessments. Because of the deduction of bonded indebtedness capital largely escaped taxation, and where bond issues were large real estate bore the burden of the tax. Senator Ford emphasized the importance of this principle:

> "It [the assessment] cannot be sworn off nor can indebtedness be offset against it. In other words, the possessor of the public franchise is placed in the same position, so far as the tax laws are concerned, as the owner of a house and lot, which property is taxed regardless of whether it is producing revenue or not and without regard to the mortgage that may be upon it, even though that mortgage covers 80 per cent of the value of the property." [13]

In contrast to the system just outlined, it is interesting to note the tax measures of other states which are considered most progressive along these lines. In no state do we find any approach to New York's diversity of public utility tax measures. This does not mean that taxes may not be as heavy in other states, but that they are assessed and collected more simply as well as more satisfactorily. At the time of their adoption some of the New York "reforms" were heralded by the press as cure-alls for tax evils and public utility injustice, yet we find them to a very limited extent, if at all, in other states. Practically no state has more than a single tax for state purposes, and frequently one assessment is used for the taxes of both state and locality.

Wisconsin for nearly fifty years used the gross earnings tax against public service corporations but gave it up for the ad valorem method. The situation in Michigan is practically the same as in Wisconsin, gross earnings discarded for the ad valorem tax. Virginia, after a careful investigation, has decided on the same method. Maryland and Pennsylvania use a capital stock valuation which amounts to a sort of ad valorem system, while Massachusetts combines different values in arriving at the corporate excess. The ad valorem system is also found in a number of the newer western states. A number of states use gross earnings as a basis and are apparently satisfied with results. Examples are Cali-

[12] In a speech at the Johnstown fair he said: ". . . . the men in the legislature from whom I obtained the most aid in pushing through the franchise tax act. . . . It required boldness of action to get it through the legislature, but it could not be passed in any other way. The qualities of courage, of boldness and of common sense have got to be shown in passing any real legislative measure which has to meet a powerful objection." *New York Tribune*, September 7, 1899.

[13] *New York Times*, April 30, 1899.

fornia, Minnesota, Rhode Island, and Connecticut. Georgia has a statute which is much like the New York special franchise tax law. In administration, however, special franchise values are not separated from other intangible property values: the special franchise values and the intangible property values become one and the same.

The kind of tax in itself may be unimportant, but emphasis should be placed on the fact that the taxes levied by the states just mentioned are simple—each has a unit system of taxation. The ad valorem and gross earnings systems are most in use, but we do not find them used together except where local assessments are made on property in states using the gross earnings basis. These states have at least secured simplicity, while the method used in New York has become more complex by trying to combine a tax on capital stock, dividends, gross earnings, and special franchises. The reform of other states has been towards a unit system; that of New York away from it by adding additional taxes to those already existing.

Difficulties with the General Tax Laws for Local and State Purposes

The success of a tax system may be judged from various angles. It may be considered from the standpoint of administrative difficulties, revenue received, opposition from the persons taxed, ease of securing a uniform burden, justice between the assessment and taxation of properties in a particular class, and justice between this class and property in other classes. That any tax system will violate none of these requirements is too much to expect, yet many tax laws are such that unnecessary burdens are placed on those who administer them and much uncertainty exists as to the justice of the tax. The New York laws taxing public service corporations are not free from serious difficulties.

The first important difficulty which appeared, and which still remains in the assessments for local purposes, was the attempt to apply the general property tax to railroads and later to other public utilities. Tax litigation began as early as 1834 and was common in succeeding years. The question causing the most difficulty was the correct method of property valuation. That the system was unsatisfactory is evident from the reports of the state assessors and comptrollers. The state comptroller in his report of 1852, for example, advanced the opinion that neither capital stock nor actual cost could be taken as the true measure of value. Neither did he consider the district assessors capable of ascertaining the value of railroad property. He suggested that such assessments might better be made by county or even state officials and the value certified back to the local districts in proportion to road mileage.[14] The legislature made the first attempt to deal with the difficulty in 1857,[15] when railroad taxation was placed under a separate statute. Real estate, including the roadbed, tracks, etc., was still to be assessed locally in the same manner as the real estate of individuals. Personal property, however, was to be assessed by the assessors in the district where the principal office of the company was located. This same method is still used for the assessment and taxation of public utilities for local purposes and the same difficulties and injustices remain that have characterized it from the first. These were recognized by the special tax commission to which we have already referred and since the same conditions still exist, magnified, of course, by the greater complexity of the companies, a short quotation from their report will be helpful.

"The system of taxing railroads in the state of New York is as imperfect and objectionable as it well might be. The roadbeds and real estate of the companies are valued and assessed in the different towns through which the line of the road extends. according to no uniform standard, but at the discretion, or rather caprice, of the local assessors, from whose decisions there is practically no appeal. In some towns the standard of valuation of the property is reported to depend on the amount annually required to defray the highway expenditures; and in another instance the erection of an expensive bridge over a navigable stream was regarded by one of the towns, on whose territory the bridge abuts, as a sufficient warrant for the erection of a new school house. In one town where a company had substituted an expensive station for a dilapidated one, to the great benefit of the town, the erection of the building was immediaely made the occasion of a large increase in the taxation to which the company was subjected. The effect of this was that the company concluded not to repeat the building of any more expensive station houses along their line, but would get along with the cheapest buildings possible; or, in other words, the action of one town in respect to taxation was made to re-

[14] *Annual report of the New York state comptroller, Assembly Documents*, 1852, vol. I, no. 10.

[15] *New York statutes*, 1857, ch. 536.

sult in detriment to all other towns on the line of the road, whose need for improved station houses might be equally or more imperative." [16]

This unequal and arbitrary assessment of public utility property by local assessors, as indicated by the above quotation, has been responsible for a large part of the litigation that has come before the courts. They have been asked to decide upon justice in values, yet have been far from consistent in their decisions. Most of the decisions in the 70's and 80's attributed an important place to earnings. The court of appeals, for example, in 1871 held that the assessors were justified in taking into consideration the earning power of the road considered as a whole. This was because "a railroad through the town only, having no connection at either end, would be of no value. The erections and superstructure would destroy its value for farming purposes. . . . Each piece of property is to be estimated in connection with its position and the business and profit to be derived therefrom. The road in question is part of a whole and is to be valued as such. This is independent of the taxation of the capital. It is the estimate of the value of the real estate for railroad purposes as a mill is to be estimated at its value for milling purposes and not at its value for a church or banking house." [17]

In 1897, however, this same court held the reproduction cost to be the proper basis for maximum valuation. The company in question had been assessed, the cost, rentals, and earnings having been taken into consideration. This assessment was admitted to be higher than the cost of reproduction. The court pointed out the difficulty in formulating any general rule for valuation, but held that the cost of reproduction seemed to be the just and reasonable rule and it could conceive of no reason for assessing the property at a sum greater than this. Whether it was really worth what it would cost to reproduce it would depend upon the earning capacity of the road after it was built. The value of a railroad for taxation might be much less than the actual cost of producing the property in the condition in which it was found by the assessors, but it could never exceed it. Any method of assessment was erroneous which included the privileges and franchises of a company in the value of its real estate.[18]

In commenting on this decision the New York Public Service Commission for the second district took the position that the real ground for the decision was not that the cost of reproduction was necessarily a true basis of value but that it was the only practical and practicable one. The reasoning of the court was interpreted somewhat as follows: The assessors were to assess the real estate, and when they began to determine how much was earned from intangibles and franchises, erroneous decisions would necessarily result. Such determinations were too great for the average assessor, so the court adopted the cost of reproduction with all its known absurdities and inconsistencies. In one town five miles of track may have been constructed with little expense, while in an adjoining one cuts and fills may have been expensive. One portion would be of as great value to the operation of the road as another. If there was any theory upon which discrepant theories could be justified it was cost of reproduction.[19]

This interpretation, however, minimizes the logic of the court's decision. If the property, track, buildings, etc., are to be assessed piecemeal and disjointedly, then the reproduction cost would represent the maximum value any particular portion could have. Very often the value might be less than this. Only when the company is assessed as a whole can the earning capacity be considered, since this is an attribute of the whole plant and not of any small, isolated part.

These cases but illustrate the situation. Numerous others might be cited, with other variations in the suggestions for determining value. They give evidence that judges and attorneys have been unable to devise a workable scheme. In the meantime the assessors continue to use their own guesswork in valuations. Many assessors do not have the time or inclination to use such schemes as the courts have formulated, while many do not possess the ability to use them even if they might desire to do so. Consequently the same difficulties in assess-

[16] *Assembly Documents*, 1871, vol. 3, no. 39.

[17] *Buffalo and State Line Railroad Company* v. *Assessors*, 48 N. Y. 70.

[18] *Delaware, Lackawanna, and Western Railroad Company* v. *Clapp*, 152 N. Y. 490.

[19] *Report of the New York Public Service Commission, Second District*, 1913, vol. III, p. 306.

ing and taxing public utilities locally that have been evident from the beginning still exist. These are intensified by the increased number, size, and complexity of the plants. Complaints of inequality continue and numerous cases of litigation arise.

Assessment and taxation for state purposes, though somewhat complicated, has been more satisfactory from the standpoint of litigation. It has sometimes been necessary for the courts to determine just what the gross earnings have been or what part of them has been derived from business "originating and terminating within the state". The taxes on capital stock, gross earnings, and dividends are more definite and more easily assessed than the old property tax, which no doubt marks an advance. With these varied bases, however, it is impossible to compare the tax burdens of the different utilities or to know when one class of property is being dealt with more severely than another. The taxation of dividends is neither just nor satisfactory. The statute is made applicable to dividends received by one corporation from other New York corporations to the extent that the second corporation has derived its earnings from New York state business. This may pile several taxes on the same earnings and is particularly unjust to those public utility companies which have required the organization of groups controlled by holding companies.

To be concluded in the December number.

THE EXCESS PROFITS TAX OF 1917

GEORGE E. HOLMES

PART II

Subject to the foregoing limitations, the invested capital of a corporation or partnership was declared by the law to be:

(4) Actual cash paid in. That is, the actual cash put into the business by the stockholder or member as his contribution of capital. Payment for stock by notes was not mentioned in the law, but was held by the regulations not to be payment in cash. Notes were classed as "tangible property" subject to rules set forth in the following paragraph.

(5) The actual cash value of tangible property paid in other than cash, for stock or shares in the corporation or partnership.[6] The statute further provided that the value of such property was to be taken as of the time at which it was paid in. No subsequent increase in value was to be considered except in one class of cases, that is, where corporations or partnerships had, prior to January 1, 1914, issued stock or shares of greater par value than the actual cash value of the property acquired, in which cases the actual cash value of the property on January 1, 1914, might be taken, but not to exceed the par value of the stock or shares in exchange for which such property was acquired. This placed a premium on over-capitalization and penalized conservatism. As most small corporations are conservatively capitalized, the restriction hit the little fellow—a result, of course, not intended by the legislators. Nevertheless, the language of the statute was plain and no relief could be extended by the administrative officials.[7]

Fortunately, the statute was broad enough to take care of a case where the capitalization of a company was not intended to correspond to the value of the property contributed by the stockholders or members, unless such property happened to be patents, trade marks, trade brands, or good will, with respect to which classes of property stringent inhibitions were considered necessary. As to tangible property, however, a broad and equitable ruling was possible, in which it was held that where it could be shown by evidence satisfactory to the Commissioner that the property had been conveyed to a corporation or partnership by gift or at a value, accurately ascertainable or definitely known *as at the date of conveyance*, clearly and substantially in

[6] The British law is that where assets have not been acquired by purchase, "the value of the assets at the time when they became assets of the trade or business" shall be invested capital without regard to the par value of the shares issued therefor.

[7] The new bill omits the provision allowing the value of tangible property of January 1, 1914, to be considered.

excess of the cash or the par value of the stock or shares paid therefor, the amount of such excess value would be deemed to be paid-in surplus. This ruling extended relief in many cases where at the time of organization it had not been considered necessary that the par value of the stock should be as great as the value of the property thereby acquired by the corporation, provided the property was not of the inhibited classes.[8]

(6) Patents and copyrights,[9] when paid for in stock or shares, could be included in invested capital only to the extent of (a) the actual cash value thereof at the time of payment, or (b) the par value of the stock issued therefor. Here we find an arbitrary limitation that might be fair in most cases, but again penalized the conservative citizen, or he who felt at the time he formed his corporation that he was well within his rights when he issued only a nominal amount of capital stock for a valuable patent or copyright. It has been argued that the par value of the stock must have fairly indicated the value which the owner himself placed on his patent when the transaction took place and is, therefore, a fair limit on the value which should be allowed for the purpose of ascertaining his invested capital. But this argument merely begs the question, for it does not take care of the exceptional case. In such case, the taxpayer has no relief, because, forsooth, its invested capital can be ascertained most "satisfactorily" under the express provisions of the statute and he cannot plead for special consideration under the much discussed Section 210 of the law.

(7) Good will, trade marks, trade brands, the franchises of a corporation or partnership, or other intangible property, when paid for in stock, could be included in invested capital only if acquired prior to March 3, 1917 (the date when the first excess profits tax went into effect), and only to the extent of (a) the actual cash value of such property at the time it was acquired, or (b) the par value of the stock issued therefor, or (c) twenty per cent of the par value of the total stock or shares outstanding on March 3, 1917. Here again was a large dose of medicine intended for the over-capitalized corporation, but which had to be swallowed by all who came in the same category—the medicine may have been all right, but the prescription should not have called for the same sized dose in all cases. In this case, as in the case of patents and copyrights, the par value of the stock may have been a fair indication of the value placed upon the good will at the time it was acquired in exchange therefor, but the provision allowing only one-fifth of the par value of the total stock outstanding as a limit can be explained only as legislation intended to affect certain individual cases or a small group of cases in a large class. Hence, he who may have purchased a going business whose most valuable asset was its good will received only partial recognition of his investment if he had incorporated his business prior to March 3, 1917, and no recognition if he had incorporated thereafter. On the other hand, if instead of purchasing the business as an individual and thereafter incorporating he had first formed the corporation, taken its stock in exchange for the cash he proposed to pay for the business and had the corporation purchase for cash, full credit was given for the good will acquired. Thus six and half a dozen are not always the same.

The British law provides that "where a trade or business has been converted into a company and the shares in the company are wholly or mainly held by the person who was the owner of the trade or business, no value shall be attached to those shares so far as they are represented by good will or otherwise than by material assets of the company unless the Commissioners of Inland Revenue in special circumstances otherwise direct." This affords an entirely different treatment of the difficulty sought to be remedied in our law by indiscriminate use of the surgeon's knife. For one thing, it places the means of relief in the hands of the administration officials who can view the particular circumstances at close range. It may be interesting to add that our new revenue bill proposes to allow patents, copyrights, secret processes and formulæ, good will, trade marks, trade brands, fran-

[8] Whether intentionally or not, the new bill seems to prohibit any value greater than the par value of the stock issued therefor to be claimed as invested capital. *Vide* sec. 326, subdiv. (a), clause 2.

[9] In the British law, patents and secret processes are deemed to be "material assets," a phrase equivalent to "tangible property" used in our law. Hence such assets are treated as indicated in note 6 above.

chises, and other like property paid in for shares of stock prior to March 3, 1917, in an amount not exceeding the lowest of the following: (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate twenty per cent of the total stock or shares of the corporation outstanding on March 3, 1917. If the stock was issued for patents or copyrights after March 3, 1917, (c) above will be twenty per cent of the par value of the stock outstanding at the beginning of the year; if issued for any other of the classes of property specified above, no allowance may be had for invested capital. No provision is made for taking care of exceptional cases where this arbitrary restriction may work hardship.

(8) Paid-in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year, may be included in invested capital. This allowance is, of course, necessary since either paid-in surplus or earned surplus is as much a contribution to the capital of the corporation as the original payment of cash or property by the stockholders. The law by implication excludes any surplus on the books of account which has not been actually paid in or earned. Thus, it is of no avail for a corporation to create a book surplus by reappraisal of its property, and any such reappraisal is expressly required, by the regulations, to be eliminated from the balance sheet. Surplus and undivided profits may be included only if used and employed in the business, and therefore any loss in the assets of the corporation due to depletion, depreciation, or obsolescence must be deducted from the surplus shown on the books of account in order to arrive at the actual surplus and undivided profits during the taxable year. The law, however, contains no requirement that depreciation or other losses should be taken into consideration in computing the invested capital with respect to the cash or property originally paid in by the stockholders or members,[10] nor does it require that such capital so originally paid in be used or employed in the business in order to be considered as invested capital. Congress apparently had in mind that the stockholders should be entitled to a deduction based upon the capital originally paid in whether or not such amount had been reduced by losses. Thus, there is nothing in the law which requires any consideration to be given to a deficit or impairment of capital, unless perhaps in the case of a corporation which has paid dividends from time to time without taking into proper consideration the constant loss due to depreciation of its plant, machinery or other physical property, as it might be argued that such a corporation had in fact paid back to the stockholders a part of their original contribution of capital through dividends which represented not only the net profits of the concern but in addition receipts which to it represented a return of capital rather than a profit. The regulations held that inasmuch as the law provided that all income of a corporation or partnership should be deemed to be received from its trade or business, all the surplus or undivided profits of a corporation or partnership (exclusive of undivided profits earned during the year) from whatever source derived, would, unless invested in inadmissible assets, be deemed to be used or employed in the business and might be included in invested capital.

The act expressly provides that "paid-in or earned *surplus and undivided profits* used or employed in the business, exclusive of *undivided profits* earned during the taxable year," might be included as invested capital. The omission of the word "surplus" in the second clause of the language quoted seems to indicate that Congress intended to permit surplus earned during the year to be included as invested capital. The use of the phrase "undivided profits" when the word "*profits*" would clearly have excluded all earnings of the year, or the use of the language in a Senate draft of the bill that "income of a trade or business arising during the taxable year shall not be included as capital employed during such year" would have unmistakably expressed an intention to exclude all earnings of the year, and would lead to the conclusion that under the general rules of construction of a statute the taxpayer would be entitled to include in invested capital as much of the earnings of the year as were permanently invested and employed in the business. The regulations, however, expressly exclude all profits earned during

[10] The British law provides for proper deduction for wear and tear or replacement in all cases.

the taxable year, and this is one of the very few instances in which the regulations adopted a ruling less favorable to the taxpayer than the language of the statute might reasonably have supported. The difficulty of distinguishing between current earnings actually reinvested in the business during the year and earnings merely accumulated for distribution at the end of the year may have militated against the broader construction of this provision of the statute. The British law (Finance [No. 2] Act, 1915) was silent as to including the earnings of the year as invested capital, but a subsequent amendment (Finance Act, 1916, s. 52) expressly excluded all earnings of the year. This may have influenced the advisory committee which drafted our regulations, but does not settle the meaning of our statute. The new bill excludes "surplus and undivided profits earned during the taxable year."

In a preceding paragraph reference was made to a requirement that losses due to depreciation, obsolescence, or other causes be deducted from invested capital. On the other hand, under certain conditions the regulations provided for the reconstruction of surplus and undivided profits account in cases where amounts had been expended in the past for the acquisition of plant, equipment, tools, patterns, furniture, fixtures, or like tangible property, having a useful life extending substantially beyond the year in which the expenditure was made and which had been charged as current expense. Such items were permitted to be restored to the surplus account when the assets were still owned and in active use by the taxpayer during the taxable year, proper deduction for depreciation or obsolescence being considered. Amounts expended in the past for good will, trade marks, and similar intangible assets were permitted to be restored to invested capital only if such assets had been explicitly paid for in the manner prescribed by the statute. When expenditures had been made for the general development of intangible assets, and charged as current expense, no readjustment was allowed. Further, in no case were amounts which had been charged to expense allowed to be restored to invested capital where such amounts had been deducted in computing taxable income upon income tax returns for 1913 for subsequent years, unless the Treasury Department had disallowed such deduction. Similarly in the British law, where an asset has been written down but the sum written off is not allowed as a deduction for the purposes of the income tax, it may be written back for the purpose of increase of capital.

The invested capital of an individual was governed by practically the same rules as those indicated above except, of course, that the questions with respect to the issue of stock or shares in exchange for property were not applicable to his case. The difficulties of determining the invested capital of an individual were, however, many and great. Where the individual kept books of account the problem was comparatively simple. Where he did not keep books of account the computation of invested capital was in most cases not very satisfactory and the experience of the department with such cases probably was in large measure the reason for not imposing an excess profits tax on individuals—or partnerships—in the provisions of the new revenue bill.

Nominal Capital

Section 209 of the law provided that in cases where a trade or business had no invested capital or not more than a nominal capital a flat tax of eight per cent should be levied on the taxable income in excess of $3,000 in the case of a corporation and $6,000 in the case of a domestic partnership or a citizen or resident of the United States. The phrase "no invested capital or not more than a nominal capital," was an unfortunate choice of language. The history of the legislation seems to indicate that Congress had in mind such businesses or trades as did not require capital, except incidentally, such as the business of a professional man or agent, and in this light the regulations were drafted. That is, an attempt was made to apply the eight per cent tax to the classes of business engaged principally in rendering personal service, in which the employment of capital is not necessary and the earnings of which are to be ascribed primarily to the activities of the owners. The mere fact that invested capital of a particular business is merely nominal under the rules laid down by the statute (e. g. conducted almost entirely on borrowed money) was held not to bring the business within the provisions relating to nominal capital if the corporation was of a class which necessarily and custom-

arily required capital for its operation. The obscure language of Section 209 bids fair to be the subject of litigation "when the war is over." The rulings of the Treasury Department did not draw a clear distinction with respect to nominal capital. One of the conditions insisted upon by the Department was that the earnings of the corporation should be the result primarily of the activities of the owners. Thus, the business of a barber was held to be one which came within the scope of Section 209, and in the case of a corporation which operated a barber shop the imposition of the tax at the graduated rates or at the very favorable flat rate was made to depend upon whether or not the stockholders of the corporation were actively engaged as barbers, etc., in the shop. If the principal stockholders were so actively engaged, the fact that the corporation might have a considerable amount of capital actually invested in the business or might employ a large number of barbers did not appear to take it out of the eight per cent class. The difficulty of drawing the line is obvious. The defect of the statute is again that it did not make provision for treating the exceptional case.

The Deduction

The statute provides for a deduction of the same percentage of the invested capital for the taxable year, as the average amount of the annual net income of the trade or business during the pre-war period was of the invested capital for the pre-war period, but in no case less than seven nor more than nine per centum of the invested capital for the taxable year. In addition, a domestic corporation was allowed the sum of $3,000, and a domestic partnership or a citizen or resident of the United States, the sum of $6,000. The calculation of the net income and invested capital for the pre-war period (1911, 1912, and 1913), a procedure which was often difficult, complicated, and expensive to the taxpayer, was required for the purpose of obtaining a maximum additional deduction of two per cent. The regulations provided that if the taxpayer was satisfied with a seven per cent deduction the computation for the pre-war period might be omitted, but a taxpayer who could show with reasonable certainty from general indications that his or its earnings in the pre-war period must have exceeded nine per cent was, nevertheless, compelled to prove that fact with all the precision required by the law in order to obtain more than the minimum deduction. Before the law had been administered very long the conclusion seemed to be pretty general that consideration of the pre-war period added greatly to the complication of the law, and the only distinctive feature remaining in the law of the "war profits" plan proposed by the Senate might well have been discarded for a single rate of deduction applicable to all corporations. A single rate of eight per cent was in fact provided in the law for all corporations formed since the pre-war period. No recognition was given in the statute to the fact that the normal rate of profit is not uniform in all lines of business and that while a deduction of seven per cent might be sufficient in the case of a stable financial or industrial concern, a business of greater financial hazard should be entitled to a larger return before its profits were considered "excessive". Of course, as the Secretary of the Treasury has so forcibly stated, "the excess profits tax must rest upon the wholly indefensible notion that it is a function of taxation to bring all profits down to one level with relation to the amount of capital invested and to deprive industry, foresight, and sagacity of their fruits." Nevertheless, if such tax is justifiable under extraordinary circumstances, a distinction might very well have been made between a business in which capital runs little risk of dissipation and a business in which the taxpayer not only risks the possible loss of productive power of his capital, but even the capital itself. It has been urged that various rates of deduction be allowed, corresponding to the financial hazard of the business, but up to the present time the difficulty of establishing general rules in that respect have seemed insurmountable and Congress apparently does not entertain the thought of leaving the application of a reasonable deduction in particular cases to the discretion of the administrative officials.

The British law provides that the statutory percentage of deduction may, on application, be increased with respect to any *class* of trade or business. The Board of Referees, under this provision of the law, had, in 1917, allowed deductions of as high as twenty-three and one-half per cent in the case of extremely hazardous businesses.

Net Income

In general, the statute provides that the net income of the taxpayer for the purpose of the excess profits tax shall be the same as that returned for the purpose of the income tax, except that the amount received as dividends upon the stock of taxable corporations shall be deducted. No distinction is made between income received in the taxable year and income earned in the taxable year. Thus a taxpayer who may have performed a contract in a preceding year and who may have justly been entitled to the compensation or the profits in that year would, nevertheless, be subject to the excess profits tax merely by reason of the fact that some accident prevented payment until the taxable year. Similarly, one who may have purchased a capital asset at some past date, the value of which had gradually increased over a period of years, was taxed upon the whole profit thereof, if realized in 1917, notwithstanding it was the profit of many years' use of his capital. In short, no distinction is made between that class of income which might be described as the current production of capital and that class of income which is an increase of capital itself. Both classes may, perhaps, properly be taxed. But to tax both classes of income at the same graduated rates is in effect to apply those rates in one instance to the amount of profits earned by the use of capital for a single year, and in the other to the aggregate amount of profits earned by the use of capital for a period of years.[11] A distinction should be made between the two. Another situation which is not covered by the statute is the case of a taxpayer who realized at one time in 1917 the fruits of a period of activity extending over several years, as, for instance, a taxpayer engaged for a number of years in performing a contract the entire compensation for which was received in 1917. Another case, often mentioned, is that of the prospector for minerals or oil, who, after many years of work and deprivation, made a discovery in 1917 and sold his "find" only to discover that tax would take the greater part of the fruits of a lifetime's work and patience. The retroactive feature of the law increased these hardships in many instances, since transactions consummated in the early part of the year were later discovered to involve the parties thereto in a tax liability not even imagined as possible at the time the transaction took place.

The Rates of the Tax

The language of the statute prescribing the rates of the tax is so ambiguous that before the Treasury Department's final construction appeared there were several "schools" of interpretation. The construction finally adopted by the Treasury Department was a compromise between that interpretation by which the rates would be applied only to the excess profits over and above the amount of the deduction, and that interpretation by which the rates would be applied to the entire income including the amount of the deduction and permitting the deduction to be subtracted only from that part of the income subject to the lowest rate. These methods may be illustrated as follows, assuming the invested capital to be $20,000, net income $10,000 and deduction $4,600:

A

	Net Income	*Deduction*	*Taxable Income*	*Rate Per cent*
Not taxable ..	$4600	$4600	None	
(15 per cent of capital)	3000	None	3000	20
(5 per cent of capital)	1000	None	1000	25
(5 per cent of capital)	1000	None	1000	35
Remainder of net income.	400	None	400	45
	$10000	$4600	$5400	

B

	Net Income	*Deduction*	*Taxable Income*	*Rate Per cent*
(15 per cent of capital)	$3000	$4600	None	20
(5 per cent of capital)	1000	None	$1000	25
(5 per cent of capital)	1000	None	1000	35
(8 per cent of capital)	1600	None	1600	45
Remainder of net income.	3400	None	3400	60
	$10000	$4600	$7000	

The construction tentatively adopted by the Treasury Department was as indicated

[11] The British law does not impose a tax on all gains from the sale of capital assets, but makes a distinction by taxing the "annual" profits or gains.

in B above, which was finally modified as follows: [12]

C

	Net Income	*Deduction*	*Taxable Income*	*Rate Per cent*
(15 per cent of capital)	$3000	$3000	None	20
(5 per cent of capital)	1000	1000	None	25
(5 per cent of capital)	1000	600	$400	35
(8 per cent of capital)	1600	None	1600	45
Remainder of income ...	3400	None	3400	60
	$10000	$4600	$5400	

Non-residents and Income Derived from Foreign Countries

Non-resident aliens and foreign corporations or partnerships doing business in this country were taxable under the law on the net income derived from sources within the United States, and the invested capital of such taxpayers was that proportion of their entire invested capital which the net income from sources within the United States bore to their entire net income.

On the other hand, citizens, residents, and domestic corporations or partnerships operating in foreign jurisdiction were subject to the tax on income derived from such operations. That is, the law taxed profits made in this country by foreigners and profits made in foreign countries by our citizens, residents, and corporations. In the case of corporations, in many of which a large part of the stockholders were non-resident aliens, the expense of doing business under an American charter was so greatly increased by the burden of the tax that the American corporation was dissolved and the business reincorporated under the laws of some other country. While our foreign business and financial operations are still a small part of our national activities, it is well to consider whether or not a policy of encouraging, rather than discouraging, the investment of capital in foreign countries by using American corporate charters should not be given weight in framing our tax laws. The new revenue bill takes a step in the right direction by permitting income, war profits and excess profits taxes paid by a domestic corporation in any foreign country upon income received from sources therein to be deducted from the aggregate similar taxes imposed on it by the bill. But this does not go far enough to supply an adequate remedy. An American corporation doing all its business in a foreign country cannot compete with local corporations when the local tax is only a small fraction of our tax. Local stockholders of the American corporation demur at the heavy tax of what to them is a foreign jurisdiction—and presently the American stockholders find a sentiment in favor of surrendering the American charter. Of course, we can adopt a provincial view and say, "Well, let 'em", but is it the wisest course?

Neither Great Britain nor Canada attempts to tax the income of domestic corporations whose business and assets are carried on and situated entirely outside those countries. This exemption is founded on well-considered reasons of policy, and is a step toward comity between nations in matters of taxation.

Exceptional Cases

Section 210 of the law provides that if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the deduction allowed to the taxpayer shall be determined by the average ratio of deduction to net income in the cases of representative concerns engaged in a like or similar trade or business. This provision seems rather to have been intended as an aid to the Treasury Department in collecting the tax than as a remedial measure to take care of the exceptional case. Nevertheless, the Treasury Department assumed to act as broadly as possible under it, and the regulations provided that

[12] The law reads as follows:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

"210 cases" would include, among others, the following:

(1) Where, through defective accounting or the lack of adequate data, it is impossible accurately to compute invested capital.

(2) Where upon application by a foreign taxpayer the Secretary of the Treasury finds that the expense of securing the data necessary for the computation of the invested capital would be unreasonable in view of the amount of tax involved, or that it is impracticable to determine either the "entire invested capital" or the "entire net income".

(3) Long-established business concerns which by reason of ultra-conservative accounting or the form and manner of their organization would, through the operation of Sec. 207, be placed at a serious disadvantage in competing with representative concerns in a like or similar trade or business.

(4) Where the invested capital is seriously disproportionate to the taxable income. Such cases may arise through:

(a) The realization in one year of the earnings of capital unproductively invested through a period of years or of the fruits of activities antedating the taxable year; or,

(b) Inability to recognize or properly allow for amortization, obsolescence, or exceptional depreciation due to the present war, or to the necessity in connection with the present war of providing plant which will not be wanted for the purposes of the trade or business after the termination of the war.

There still remain, however, many exceptional cases where the invested capital can be satisfactorily ascertained in strict accordance with the law and still be eminently unfair to the taxpayer. There are some cases where patents, copyrights, trade marks, trade brands, or good will acquired in exchange for stock, *should* be taken in at full value as invested capital regardless of the par value of the stock or the accident of the number of shares that happened to be outstanding on a certain date. There are cases where the value of such assets should be allowed although no stock was ever issued and no value is carried on the books of account of the corporation. A case like that may arise where one of two partners purchases the other's half interest in the good will of the business for a substantial sum and subsequently incorporates without issuing stock to represent that good will. Over-capitalization has been general, but not universal, and under-capitalization should be brought up to a level as well as bring over-capitalization down. Many inequalities of capitalization of corporations exist in this country and the formal capitalization is no criterion of the real capitalization. The real capitalization cannot always be reached by rule of thumb. Individual consideration of the exceptional case is necessary, and in such cases the tax should be imposed under broad general principles of law and not by minute, arbitrary rules. Income properly subject to an excess profits tax is also a matter of serious consideration. It should not in all cases be the total receipts of income in the taxable year. Consideration should be given to cases where such receipts are properly allocated to some past period or some other jurisdiction. Within definite limits the rate of deduction should be variable to compensate for the varying hazard of investment. In other words, a tax of such tremendous size and consequences should be collected by the skilful maneuvering of a Foch and not the brutal mass attack of a Hindenburg. Great Britain has her Board of Referees. We should have ours. Whether or not such a board should be a part of the Treasury Department or an independent court is a matter of debate; whether or not it should sit in Washington or at various places throughout the country is a matter of detail. We should have a body of able men with freedom to determine facts unhampered by arbitrary rules of statute in order to lay the tax burden where in justice it belongs and not merely where by form it falls.

"VALUE" IN REAL ESTATE ASSESSMENT

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It is a generally accepted dictum that property should be assessed at its full value. Full value may also be termed "fair market value". The question then arises whether these terms have more than one meaning.

The value of anything is the amount of something else (ordinarily money) for which it will exchange. When an article is being sold every day on an established market it is a simple matter to determine the value at any day or hour by merely noting the market price. Thus the value of wheat is always definitely determined. On the other hand, there are articles which are exchanged only at long and irregular intervals. In such cases it is a difficult matter to determine their value at a time when there is no sale. Land is one of the most important examples. At the moment when a given piece of land is sold the selling price measures correctly its value. But it may be ten years before that piece of land is sold again. In the meantime, what is its value? To answer the question we have to assume a sale and estimate as nearly as we can what price would be paid for the land at the present. If there is reason to think that under ordinary circumstances this piece of land could at present be sold for a certain sum, that sum may fairly be said to be its present value. It is important that we base our assumed sale on normal present conditions. Neither a hurried forced sale under foreclosure nor a lucky sale to an eccentric millionaire should be the basis of our assumption.

Farm land having features which make it possibly attractive as suburban property and further features which might make it attractive for extreme improvement by the very wealthy may be said to have four different market values. The same piece of ground which to the average farmer might appear a purchase at $24,000 might also to the gentleman farmer look attractive at $36,000. To the developer of suburban villas $40,000 might not seem excessive, and to the millionaire who expected to spend $200,000 or $300,000 in improvements $60,000 to $80,000 might not stand in the way of his purchase. Yet, after all, land of that character under foreclosure might on occasion, if unprotected, sell for $10,000 or $12,000. In such a case the use assumed should be the one for which it is most likely, under normal circumstances, that this piece of land, or land like it, would be bought.

Another important consideration, often forgotten or violated, is that the market value of anything is its *present* value, never some assumed future value. The present value may be (in fact, necessarily is) based on a future *use*, but it is present value and not future value that we are seeking. In the case of vacant city lots this consideration becomes very important. They are bringing in no present return. Their value is more than usually speculative, depending on future and uncertain returns. Their market value is not the price which the owner may hope some time to obtain, but the price which it is reasonable to believe could be obtained under normal circumstances at the present time.

All values fluctuate from time to time, and real estate is no exception to the rule. The purchaser of vacant city lots may wait for thirty years before he can obtain again the price he paid for such lots. The speculative wave may rise and fall but once in a half-century. The fluctuation in values of suitably improved properties is not so marked but it exists; and, while it is measured in years as compared with stock market fluctuations measured in months, it is not in other respects materially different. The value of a stock for taxation is taken as of the day when the tax is fixed. In the case of the inheritance tax, its value is taken as of the date of the death of the decedent.

The custom with real estate tax values is to hold them more or less fixed for years together. It is therefore important that, so far as improved property is concerned, the tax should not be determined at the crest

of a wave of increased values, which would be unjust to the owner, nor at the bottom of a depression in values, which would be unfair to the state.

The case of *People ex rel. Strong* v. *Hart*, 216 N. Y. 513, is in point. The opinion is written by Chief Justice Willard Bartlett.

The property in question had never been subdivided into lots. The assessors, however, treated it as capable of being thus subdivided, and the decision was in effect that the assessors had taken into consideration matters which were essentially speculative in character, depending upon conditions that might or might not exist, and upholds the view of the judge at special term, that he himself would be unwarranted in accepting testimony as to values upon the conjectured outcome of a proposed venture in subdividing the property and offering it for sale in lots.

The matter had come before the special term on *certiorari* to review an assessment for the purpose of taxation on the property.

The decision quotes Justice Cullen [1] in the matter of *Daly* v. *Smith*, 18 App. Div. 194, at page 197, to the effect that "when it is sought to show that a tract of land has a use for a particular purpose it must also be shown that it is marketable for that purpose or has an intrinsic value. . . . Nearly any tract of land or any farm can be cut up into lots or villa sites. The question is not whether it can be so subdivided, but whether purchasers for the lots can be found and also *how speedily found*. For if only small parts can be sold at intervals and a number of years must elapse before the whole property can be disposed of, it is apparent that *it would be unfair to take as a present value* of the property a sum only to be realized after a long lapse of time." The opinion continues: "The propriety of pursuing the course adopted by the assessors in the present case, therefore, depended upon the question whether the relator's property *was presently marketable if subdivided* according to their assumption."

It seems to be made clear, therefore, that if, out of perhaps 500 vacant lots, there is a market for but two, the price paid for those two does not fix a market value for the remaining 498 lots, which may be ten or twenty years in the selling at that figure. The owner may hold them at that value and the real estate appraiser fix that figure upon them, but the assessor is not at liberty to utilize it as the basis for fixing that rate as the assessed value of each of the remaining 498 lots.

Reference is also made to two cases entitled *People ex rel. Coney Island Jockey Club* v. *Lawson Purdy, et al., Commissioners.*

Justice Kelby in special term, second department, made orders reducing the assessed tax values of 1912 and 1913 in these two cases, on the ground that the land was idle and that there was no change in the surrounding physical circumstances and conditions and that a later contract which might be consummated, showing some evidence of increased value, indicated, as he expressed it, "a speculative, even an adventurous sale." His opinion, which is brief, is quoted in the case in 172 App. Div. 919. The pages are given of the decisions upholding his opinion, but in each case no additional opinion is written. They are 213 N. Y. 652; 161 App. Div. 943; 218 N. Y. 714; and the above mentioned 172 App. Div. 919.

The *New York Times* of August 13, 1916, under the heading "Increment Imaginary," states that the court of appeals has handed down a decision holding unjustifiable increases of assessment values upon numerous lots in Brooklyn. The taxation for 1915 over 1914 was an increase of 20 per cent in 82 out of 118 cases reviewed, and in the remaining cases from 7 to 20 per cent. The city claimed an increase in value due to the expiration of restrictive covenants and the construction of the depressed Sea Beach Line. The evidence showed that only a few sales of lots in this tract were made and that they did not indicate any general increase in actual values. For some unexplained reason the property had remained dormant, and the conclusion was that the deputy tax commissioner had based the increase in assessment upon anticipatory rather than upon actual increases in value: sales to the Sea Beach Railroad Company did not furnish any fair criterion of the value of remaining lots in tract.

In New York City for many years vacant land was assessed at from 35 per cent to 40 per cent of its assumed speculative value and produced, without complaint on the part of the owners, a very considerable percentage of the annual tax of the city. This seems not to have been done on any tax theory, but merely by reason of the appreciation by the several successive tax boards of the practical elements of the problem, by which they realized that for the longest term they could obtain the largest amount of revenue. Their practical sense of what was expedient seems now to be justified by the theory, which as usual has worked out long after the practice has become established, and only demonstrates the intuitive wisdom of those who inaugurated the practice.

Of late years, however, theorists have come in who, without due regard to the practical side of the question, have utilized the bare wording of the New York statute,

[1] Justice Cullen was later and for many years chief justice of the court of appeals. Both he and Justice Bartlett were men of exceptional ability, whose opinions are of more than average value.

in disregard of these quoted cases, to inflate tax valuations, particularly of vacant land, to the point which is not only in excess of present values but destructive of future values, raising for the moment an excessive taxation but destroying in the same act the value of the property for taxation in future years. The time seems to be ripe for a clear appreciation of the distinction between market value as generally used and market value for the purposes of taxation, with the speculative feature deducted.

A BRIEF HISTORY OF TAX REFORM IN VIRGINIA

J. VAUGHAN GARY

The history of tax reform in Virginia, in progress for the past four years, offers a productive field for students of taxation which they might well explore with pleasure and profit. The legislature has not dealt gently with the time-honored principles under which the commonwealth struggled for a number of years but has supplanted them with a system more in accord with modern ideas. For several years prior to 1914 there was in evidence throughout the state a growing discontent among taxpayers, who were chafing under the inequalities of ancient and unscientific tax laws. The system of taxation, if it may be termed such, was based upon a uniform property tax on real estate and tangible and intangible personal property, supplemented by an extensive system of license and privilege taxes, a nominal tax on the income of persons, a tax on collateral inheritances, and numerous special taxes, as capitation or poll tax, taxes on wills and administrations, deeds, contracts and agreements when made matters of record, suits, actions, motions and proceedings at law, seals, fees on the charters of corporations, annual registration fees required of corporations, and annual franchise taxes.

In 1914 the legislature paved the way for a definite reform by the creation of a joint committee on tax revision. After careful and systematic investigation and study, covering a period of approximately eight months, during which time public hearings were held in various sections of the state and a great mass of documents, reports, papers, and other materials descriptive of conditions in this state and in others examined, the committee formulated its report, which was presented at a special session of the general assembly called in January, 1916, for the express purpose of tax revision. This report in no uncertain terms pointed out the defects of the uniform property tax. The investigations of the committee disclosed a universal practice of undervaluation in the assessment of real estate and tangible personal property throughout the state, while intangible personal property, which bore the same rate of taxation but did not admit of undervaluation as readily as real estate and tangible personal property, was found to be assessed at its fair market value. When listed at all, therefore, it paid an average tax that was more than twice as high as that on tangible personal property and nearly three times as high as that on real estate. This great and glaring inequality encouraged the concealment of a very large proportion of intangible property, which because of its very nature may be easily concealed and escape any taxation at all.

In the light of these facts the legislature discarded the uniform property tax and adopted a system of partial segregation. All taxable real estate and tangible personal property, including the tangible personal property of public service corporations (except rolling stock of corporations operating railroads by steam), were segregated and made subject to local taxation only, except that the state school tax of 10 cents on every $100 of the assessed valuation thereof was continued. All capital of merchants was completely segregated and made subject to local taxation only, the state continuing its policy of levying a merchants license tax graded according to the amount of purchases. All insurance taxes and licenses on insurance companies, all taxable intangible personal property (including the capital of persons, firms, and corporations engaged in a trade or business

not otherwise taxable), rolling stock of all corporations operating railroads by steam, and all other classes of property, were segregated and made subject to state taxation only, except that the cities and counties within the state were authorized to levy a tax upon segregated intangible personal property assessed to the residents therein at a rate not to exceed 30 cents upon the $100 valuation thereof, the county levy to be used exclusively for the construction and repair of roads. Money on hand and on deposit had been completely segregated and made subject to state taxation only by the legislature in 1914.

Prior to the enactment of the segregation act the state levied a tax rate of 35 cents on the $100 of the assessed value of all taxable property and the cities and counties levied such rates as were deemed by their respective councils and boards of supervisors necessary to cover their annual expenditures. The combined state and local rates varied between $1.15 and $3.70 on the $100. The average for the whole state was about $1.50. Under the provisions of the segregation act, real estate and tangible personal property in addition to the 10-cent school tax retained by the state are still assessed by the localities at such rate as the annual expenditures require. The rate of taxation on all taxable intangible property (other than capital of persons, firms, and corporations employed in a trade or business not otherwise taxed) for state purposes is 65 cents on the $100 of the assessed valuation; which, with the maximum rate of 30 cents on $100 allowed to the localities, constitutes a maximum rate of 95 cents for state and local taxation. The capital of persons, firms, and corporations employed in a trade or business not otherwise taxed is taxed by the state at a rate of 70 cents on the $100 of the assessed valuation; which, with the maximum local rate of 30 cents, constitutes a maximum rate of $1.00. Several of the localities, however, do not impose any levies at all on intangibles and many impose levies at a rate less than that allowed by law. Money is subject to state taxation only at a rate of 20 cents on the $100.

An inventory of machinery on hand for the ascertainment and assessment of property disclosed a condition wholly inadequate for guaranteeing the successful operation of the new laws, and the special session of the legislature also addressed itself to the task of making suitable substitutions and additions. The principal change perfected during this session was the creation of a state advisory board on taxation, whose membership was purely ex-officio, consisting of the governor of the state, the chairman of the state corporation commission, and the auditor of public accounts. This board was limited to the exercise of general advisory powers over the various tax officers, but these powers were extended by the legislature one year later. The act passed during the 1916 session changed the name to the state tax board, invested the board with supervisory powers over all tax officers, and charged it with the duty of instructing tax officers respecting the discharge of their duties. Under this act the board also has the power to investigate the conduct of tax officers and to report to the various courts of record cases of malfeasance, misfeasance, and neglect of official duty; to institute proceedings in court and to do other acts necessary to promote fairness and equality of assessment and taxation; to employ such attorneys and assistants as it deems necessary to the proper discharge of its duties; and to exercise certain other powers conferred upon it by statute. The board regularly employs one counsel and executive assistant and one second assistant, both of whom are licensed attorneys, and one clerk and stenographer, and from time to time such other assistants as are necessary.

Another addition to the machinery was the creation of a local board of review of assessment for each county and city in the state. Each of these boards is composed of three members, appointed by the judge of the circuit or corporation court of their respective county or city. They were created for the purpose of reviewing assessments with respect to the valuations of property reported and assessed for taxation, and are authorized to increase or decrease the same so as to bring about full, complete, and uniform assessments at fair market value. It might be said, however, that the work of these boards has not proved as satisfactory as was anticipated. Although composed mostly of laymen, they have in a number of instances arrogated to themselves the power of passing upon the validity of assessments and have attempted to decide some of the most abstruse questions arising under the laws of taxation, which

has resulted at times in the elimination of large quantities of taxable values from the assessment books. A bill to abolish these boards introduced at the 1918 session of the legislature passed the House of Delegates by an overwhelming vote, but failed to reach a vote in the Senate because of the congested condition of the calendar.

In striking contrast with this condition is the unqualified success which has attended the various changes pertaining to the examiners of records. Prior to 1916 one of these officers was appointed for each judicial circuit of Virginia by the circuit judge thereof, but when the state tax board was created the power of appointment was conferred upon the board. Their duties originally related to the reporting for assessment and taxation of vessel property and of personal property in the hands of fiduciaries. During the session of 1914, however, these duties were so extended as to permit the examiners of records to investigate, ascertain, and report for taxation any person, property, income or license which has not been reported and assessed for taxation for any year by the state, county, district, city, or town. This law was further amended in 1916 and a provision inserted that all assessments of intangible personal property, money, and income for state taxes prior to the year 1903 should be conclusively presumed to be full, true, and correct, and that no municipal, county, or district tax should be levied or collected on any assessment of intangible personal property for taxes alleged to have been omitted from the assessments prior to 1912. In 1918 the legislature added to the duties of the examiners of record the ascertaining and reporting for taxation of omitted inheritance taxes, but limited the assessment of all persons, property, income, license taxes, or inheritance taxes which have not been assessed for taxation to three years next preceding that in which ascertainment of such omission is made.

The activities of the examiners of records in performing the additional duties placed upon them by the legislature have contributed in large measure to the success of the new system of taxation. Prior to the amendments extending their powers it had long been the practice of the assessing officers, who are elected by the people, to accept without question the declaration of the taxpayer and no means whatever was provided for checking the accuracy of it. The custom of evasion had, therefore, become deep-rooted and widespread. Under the present system the declaration of the taxpayer is reviewed by the local boards of review and it is the duty of the examiners of records to assist the local boards of review in examining and investigating the same. The local boards of review or the examiners of records may require the taxpayer to furnish them access to his books of accounts or other papers and records for the purpose of verifying the tax return made by such taxpayer, or may summon the taxpayer before them and require answer under oath to all questions touching the ownership and value of his intangible personal property, money, and income and the reports of purchases of merchants. In actual practice the examiners of records have conducted practically all these investigations and their activities in thus checking the accuracy of the returns have brought to light and placed on the assessment rolls great quantities of property which previously escaped taxation altogether. Moreover, their activities have caused taxpayers to realize that property concealed from taxation would eventually be discovered and assessed with penalty and interest, which realization has operated as a stimulus to bring about full, true, and complete voluntary returns.

Now that the principal features of this new system have been in operation for a period of three years, it may be said with certainty that the results have fully justified the changes which have been effected. Notwithstanding the loss of revenue to the amount of approximately $450,000 annually, which prior to the passage of the prohibition act in 1916 was derived from liquor licenses, the total receipts from all sources of revenue increased from $7,797,532.51 for the fiscal year ending September 30, 1914, to $9,208,127.99 for the fiscal year ending September 30, 1917. The results of the changes hereinbefore set out may be more directly shown, however, by the following tabulation of taxable money, income, and intangible property assessed for current taxation for the years enumerated.

	Fiscal year ending September 30			
	1914	1915	1916	1917
Money on deposit	$25,820,978	$34,918,470	$41,336,850	$51,097,429
Income	19,346,512	21,326,776	41,336,850	64,259,538
Intangible property	131,317,122	185,633,601	195,360,432	218,342,645

In addition to these values reported and assessed for current taxation for the years enumerated above, the examiners of records have ascertained and reported for assessment the following values of omitted intangible personal property, money, and income:

During the fiscal year ending September 30, 1915	$152,576,879
During the fiscal year ending September 30, 1916	114,336,076
During the fiscal year ending September 30, 1917	34,007,922
Total	$300,920,877

Moreover, results of far greater consequence than those measured in dollars and cents are apparent throughout the state. The voices of the severest critics have been silenced, the feeling of discontent has disappeared, and the spirit of antagonism has been supplanted by an increasing spirit of co-operation. The writer, whose duties in representing the commonwealth in tax proceedings have carried him to all sections of the state, has found on all sides indisputable evidence of approbation and satisfaction on the part of taxpayers generally. The fact that the new system of taxation, as such, suffered practically no changes during the past session of the legislature also bears evidence of this satisfaction.

The 1918 session, however, did bring about some material changes in the general tax laws, the most important of which is the provision for a special tax of eight cents on the $100 of the assessed value of all property. This action was necessitated by an inevitable increase in the salary of public school teachers, the adoption of a public highway system providing for a comprehensive plan of road construction, and the enlargement of the work of caring for tubercular citizens because of the great number of cases disclosed by the medical examinations conducted under the federal selective service act. The revenue derived from this special act was appropriated for these special purposes, to be distributed on the basis of four cents for schools, three cents for roads, and one cent for the prevention and eradication of tuberculosis.

As a further step toward complete segregation the shares of stock of banks, banking associations, trust and security companies, which prior to the passage of the 1918 act were assessed by the state at 35 cents on the $100 of the actual value thereof and $1.15 by the locality, were segregated and made subject to local taxation at a rate of $1.25 on the $100 of the actual value thereof. The state tax of 10 cents on the $100 of the actual value was retained for public schools, however, which with the special eight cents levy will constitute a state tax of 18 cents. The actual value of such shares of stock is found by adding together the paid-in capital, surplus, and undivided profits of the institution, taking therefrom the assessed value of the real estate owned by the institution and any bonds of the locality in which the bank is located which it may hold, and dividing the amount thus found by the number of shares of stock outstanding.

A new direct and collateral inheritance tax act, recommended by the state tax board and modeled somewhat after the Massachusetts law, supplanted a vague and indefinite act which hopelessly combined the two different theories of estate and inheritance taxation. The income tax law also felt the touch of the legislative hand, but only to the extent of remedying certain minor imperfections, and the addition of several desirable features providing for more direct taxation of income at the source and better methods of assessing the income of persons and corporations doing their business partly within and partly without the state. Residence for the purposes of personal taxation was more clearly defined by the passage of an act providing that a person who has had his actual or habitual place of abode in this state for the larger portion of the twelve months next preceding the first day of February in each year shall be deemed a resident for the purpose of taxation.

Amendments affecting the definition and situs of capital employed in business and others of little general interest rounded out a program the intent of which was largely to obviate ambiguities, promote further uniformity and equality, and perfect the system previously adopted. The fresh impetus of this constructive program will undoubtedly bring still greater success, and it may safely be predicted that the classified property tax and the plan of segregation will remain on the statute books of Virginia for many years.

THE STOCK DIVIDEND AGAIN

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I take it as clear that a stock dividend is not income in any valid economic sense. It is a mere reshuffling of the titles to existing bases of income. Equally clear is it that if the declaration of a stock dividend induces the belief that the property is worth more than its previous quotations have indicated, this is not income but merely a change in the market value of the titles.

But let us follow out the logic of these positions to their inevitable conclusions:

If a stock dividend indicates merely a general rise in prices in which the particular property has shared, new stock being issued to make the capital stock of the corporation reflect the new price situation, no one, I take it, would call this increase of price an income. Otherwise, most men just now must be prospering incredibly, the changing prices increasing the national income to the point of approximately one hundred and twenty billions annually.

But suppose the new issue of stocks reflects past gains still undivided. Is the stock issue a division of these? Agree that this present acknowledgment of past gains is not a present income. Were they incomes in the past, these gains that, undivided, justified higher prices on the stocks? They are merely increased capital; instead of being divided, they went back into the business, furnishing the capital that else might have been obtained by the sale of new stocks. So again, if my farm increases in price by $1,000 by virtue of coming to command higher rent, this $1,000 rise is not income; it indicates merely that my property is yielding and promising a $50 increase in annual income, a $1,000 increase in the capital price.

But if a stock dividend of $100 to go with my old stock of $100 is not income, what if the company were to liquidate, canceling my stock and turning over to me $200 in cash? Do I now have $100 or $200 of present income, or have I no present income—merely $200 cash in place of my $200 worth of stock? I am neither the richer or the poorer for the liquidation. The cash is no more and no less an income than was the stock dividend — just more cash and less stock.

Would, then, a cash dividend of $100 instead of a stock dividend have been income? It ought to be, if any cash dividend is income; it gives me in lump what I might have had in small fractions concurrently with its earning, cash now in place of cash then. My original investment of $100 was slowly changing into $200 and is now reduced to $100 by paying me off with the second $100. Unless one takes it that I have received my income bit by bit in the form of rising values, it looks as if I must be regarded as getting it now in lump; I have the $100 to spend now—if I like. But if I am given $100 of dividend stock, I can sell this now for cash — if I like — spend the $100 and still have my $100 of original investment. Are we going to decide that the $100 of stock is income if and when I decide to sell it, and increased capital if and only as long as I keep it? Or is it increased capital if I keep it but income if I sell and then buy something else with the proceeds in its place? Or if, as we begin to suspect, the earnings cannot be income before they are distributed as dividends, and are not income when now they are recognized in new stock issues, and are not income if paid in cash and reinvested—it looks as if I might forever escape my income tax, never being at any stage in the process convictable of getting any income.

Obviously, it will not do to find the test of income in whether I keep or sell my new $100 certificate of stock unless it be at the same time asked what I do with my $100 that I get from it. If, holding my $100 of new stock in company X together with my earlier $100, I am accountable for no income, shall I be any the more accountable if I swap my new $100 of stock for $100 of stock in company Y? If my Y stock had come to me by the distribution of the treasury holdings of company X—just another sort of stock dividend — Professor Fairchild is clear that no income would have emerged. I should be simply putting into my name what all the while had been mine under the corporate trusteeship in my interest.

What am I trying to get at? Nothing in

particular: there is no exit from the house on the level of this floor. On the basis of reckoning income by receipts anybody or anything is equally easily proved right or proved wrong. The fact is that the entire theory of income under the income tax as we now have it, or as it is elsewhere, is really indefensible in strict logic. In principle, no income is received until it is spent, and spent not in the sense of reinvestment but of use for consumption. If, having received a money income, one loses the money, or if, a crop having been garnered it rots or burns, there has been no income in any ultimate sense. "Psychic income" is the only real and final income. Taxes, then, should be based on incomes spent rather than on incomes received. In the last analysis all taxes are taxes on consumption: they restrict individual gratifications in order that the state shall have disposition over purchasing power to the end of supplying other utilities for consumption. Money income received and reinvested is merely an intermediate step toward getting sometime an ultimate income — as Cannon and Fisher have made clear.

In view of the various debits and credits in the problem I am not sure that this expenditure basis for income taxes is practically expedient. That it would weight the scales in favor of saving as against spending—a clear advantage according to traditionally received opinion—does not seem to me decisive. Over-saving is both a theoretical and a practical possibility. The busy bees and the provident ants may conceivably come into too great financial power, together with various derivative powers. The administrative difficulties in income-expended taxation might also turn out to be more serious than they appear in prospect. As appealing to objective indicia, this expense basis would seem to offer decided advantages. The articulation of direct income taxes with indirect income taxes—excise, customs, consumption taxes —would be much closer, squaring better with logic and with justice. In any case the problem would cease to bristle with all sorts of contradictions and paradoxes.

NOTES AND NEWS ITEMS

THE OFFICE OF COUNTY ASSESSOR ABOLISHED IN KENTUCKY

The unsatisfactory methods of the assessment of property by local assessors for state and county purposes is well known, but the position has been of so much importance as a vote-gatherer for other offices that the efforts to change the system have been generally abortive. However, in carrying out the plans for the improvement of the tax laws in Kentucky, the constitutional amendment adopted in 1915, enabling the classification of property and separation of state and local taxes, the main obstacle was the local county assessor.

In spite of this, a law abolishing the office of county assessor was enacted by the general assembly of 1918. This new law creates the office of "county tax commissioner" which in effect means "deputy state tax commissioner" as it is subservient to the state tax commission now delegated with the supervision of all the taxing machinery of the state and counties.

The county tax commissioners will have offices to be occupied permanently, where taxpayers must report and may confer and where the assessment registers will be available for comparison and correction. Bonds are required for faithful performance and penalties inflicted for failure to comply with the law. If assessments are unequal or inadequate the state tax commission can require corrections, and when necessary may go or send to the county to make a different assessment altogether uninfluenced by local prejudices or partiality.

Under the new law there will be an annual conference of the commissioners for instruction and direction in the interest of uniformity in assessments of all classes of property. The authority of the state tax commission extends to the county boards of supervisors, who revise the work of the commissioners and report on same. The number of supervisors has been increased to secure a representative from each magisterial district instead of being limited to three in each county, as these were sometimes all selected from a single district.

As will be seen from this summary of the new plan affecting local assessors, the office has been elevated and permanently established.

Kentucky Tax Reform Association.
P. N. Clarke, Secretary.

INSTRUCTION OF ASSESSORS IN MINNESOTA

Members of the Minnesota Tax Commission on May 1 completed the most successful series of schools of instruction for local assessors since that body was organized. During an interval of seven weeks 88 meetings were conducted in the 86 counties of the state and these were attended by approximately 2,400 of the 2,500 town, village and city assessors. This is considered a remarkable record in view of the fact that in several of the northern counties many assessors were obliged to travel from 75 to 100 miles to reach the meeting place. When it is remembered that St. Louis County, famed for its iron ore, is 400 square miles larger than the states of Connecticut and Rhode Island combined; that Beltrami County is 200 square miles larger than the state of Delaware; and that several other counties compare favorably in size with entire eastern states, the difficulties of obtaining large attendance at the meetings will be appreciated. Assessors receive from the county $3.00 for attending these schools of instruction and five cents for each mile traveled.

It is the opinion of the commission, based on long experience, that these meetings are decidedly stimulating and beneficial. The original skepticism and even antagonism of the assessors has been entirely overcome. The sessions are entirely informal in character and every opportunity is given to those in attendance to ask questions. This usually is taken advantage of with alacrity and the commissioner presiding often is deluged with inquiries of every nature and description, thus adding much to the interest of the meeting.

In order that the public may be accurately advised as to the proceedings, each commissioner prepares a brief article for publication in the local press and leaves copies with the county auditor. Generally the editors are glad to get these articles and as a result much valuable educational matter in regard to these little-understood questions is widely circulated and the effect has been most excellent in arousing public sentiment and in dignifying the position of the assessor in his own community.

The commission this year supplemented these schools of instruction by personal visits to about 200 districts selected at random while the assessment was being made. While this is an innovation, the results justified the effort. Special letters were sent to each assessor notifying him that one of the commission might drop in on him unannounced at any time. While it was possible to visit but a few of the 2,500 districts, yet in the opinion of the commission the moral effect of the announcement was effective, especially since it was given wide publicity by the press. The commission prepares each year a comprehensive letter of instruction which is sent to all assessors. This contains, in addition to general advice and information, figures showing the amount of taxes raised in each man's particular county the last year, the distribution of such taxes, average tax rates, and similar useful statistics for the assessor to carry with him on his rounds. These letters have proved very valuable and tend to keep assessors in close personal touch with the commission and its work.

H. A. S. Ives.

Minnesota Tax Commission.

FOREST TAXATION IN NEW HAMPSHIRE

The New Hampshire constitutional convention met early in June and adjourned without taking any action of importance. We quote the following from a letter of Mr. Philip W. Ayres, founder of the Society for the Protection of New Hampshire Forests, who, by the way, has found the BULLETIN so valuable in his work that he joined the National Tax Association last summer:

"We got before the convention our measure for separate classification of forests, and it was voted down by 159 to 122. The farmers all voted against it because they were convinced that it meant *exemption* of growing forests with additional taxes on real estate for them. They were misled by the officers of the state grange, I think, who seemed unable to see that as growing forests are being removed—and they are disappearing rapidly—the farmers will have to bear the added burden.

"We were able to save the convention, however, and a committee was appointed to call it together again within a year of the declaration of peace. The friends of our measure feel that we brought it squarely before the public and that the adverse vote will not count against it in future consideration. Some of our friends feel that the general measure, opening the door to the legislature for classification of all property, is better than the special one and will more easily secure approval later at the polls. Under this general measure or under the income tax we can make a satisfactory arrangement to protect growing forests, so that I feel sure that we shall ultimately attain the object desired."

TAXATION OF STREET RAILWAYS IN RHODE ISLAND

WITH COMPARATIVE DATA FROM THE OTHER STATES

From report of the special commission for the investigation of the affairs of the Rhode Island Company, March, 1918

The method of taxation applied to the Rhode Island Company and its subsidiaries has grown by a series of additions to and amendments of the general and public laws from time to time into a complicated system, resulting in excessive burdens. The taxes have increased steadily not only in amount but also in the percentage of gross earnings required to meet them for the last ten or twelve years.

So far as this state alone is concerned, the Rhode Island Company pays taxes to 42 subordinate taxing jurisdictions as well as to the state itself, and in 12 of these subordinate jurisdictions it pays two kinds of taxes. These various taxes, paid to the state and its subordinate jurisdictions, amount to $498,186, or 8.44 per cent of operating revenue; and if the taxes paid to the United States ($34,468) and the state of Connecticut ($1,966) be added, the tax imposed amounts to 9.04 per cent. If the calculation includes the payments made by the Rhode Island Company for paving, and is based on revenue received from passengers only, the percentage reaches 10.73 per cent.

Such a rate of taxation cannot be justified. Even if it were a fact that the receipts enabled the payment to be made without interfering with a fair and equitable return on the capital properly invested, your commission considers it unjust to exact in taxes a half a cent out of each five cents paid by a passenger. More than six per cent of the passenger revenue is required to pay the taxes enacted by the state and the several cities and towns exclusive of the taxes on real estate and tangible personalty. The opinion of your commission is that such an exaction is extremely excessive.

There does not appear to be any sufficient reason, considering the method of taxation employed in this state, to modify the tax upon the real estate and tangible personal property of the various companies. The total assessed valuation of such property is $10,446,974. The valuation of this property by the engineers of the commission is $16,832,613, but in their valuation are included such items as grading, special work, track and roadway labor, paving, land damages, and the like, which are not properly taxable locally and which amount in the aggregate to approximately $4,000,000. The local assessed valuation of the real estate and tangible personalty is found to be something over 80 per cent of the value fixed by the engineers, and this, in the opinion of your commission, is a higher ratio than the average for similar property throughout the state.

Your commission believes that property of this character should pay its proportionate part of the taxes raised from similar property, and that the charge is a proper one to impose upon the patrons of the utility.

In the case under discussion the incidence of the whole tax is readily traced to the Rhode Island Company, at least for the last few years, as sufficient revenue has not been obtained to pay any return whatever upon its properly invested capital or to meet depreciation and renewals. Whether or not the tax falls upon the company or the passenger, a system of taxation which exacts either 10 per cent of the fare paid by the passenger, or prevents the realization of a fair and equitable return upon properly invested capital, or makes it impossible to take care of depreciation and renewals properly, cannot be justified upon any reasonable grounds.

Methods of taxation in the several states vary so radically that it is very difficult to make satisfactory comparisons. Assessed valuations vary from 30 per cent to approximately 100 per cent of full value. There is no uniformity in the assessment of either tangibles or intangibles. Stock and

bonds outstanding have no relation to either investment or "fair value," except in a few states, and it is impracticable to obtain the market value of securities in a sufficient number of cases to be of use. Thus there is no common base upon which comparison may be safely made.

TAXES PAID BY ELECTRIC RAILWAYS IN THE UNITED STATES IN 1912

Compiled from U. S. Department of Commerce report

States	No. of companies	Stocks and bonds	Gross income	Operating revenue	Taxes				
					Amount	Per cent on stocks and bonds	Per cent on gross income	Per cent on operating revenue	In cents per car mile
South Carolina	6	$13,049,305	$1,355,270	$1,345,450	$36,895	.29	2.72	2.74	.79
North Carolina	13	23,923,300	2,348,715	2,127,884	59,479	.25	2.53	2.80	1.01
Iowa	24	53,536,119	7,452,454	7,372,945	209,664	.39	2.81	2.33	.94
North Dakota	5	784,555	238,587	238,587	7,375	.47	3.10	3.10	.65
South Dakota		790,350							
New Hampshire	13	6,485,400	1,250,391	1,246,184	39,912	.62	3.19	3.21	.84
Vermont	9	5,661,658	631,241	600,717	19,596	.35	3.10	3.26	1.10
New Mexico	6	516,000	360,288	345,105	11,453	.20	3.18	3.32	.80
Arizona		5,279,500							
Indiana	34	191,331,922	16,142,075	15,718,651	536,210	.28	3.32	3.41	1.12
Maine	16	35,144,207	3,593,617	3,518,322	120,208	.34	3.35	3.42	1.08
Mississippi	12	9,625,494	910,390	899,524	33,302	.35	3.66	3.71	.94
Texas	39	44,196,904	8,514,403	8,441,111	318,551	.72	3.74	3.78	1.14
Idaho	12	9,274,609	3,894,371	3,873,085	156,302	.60	4.02	4.04	1.80
Wyoming		895,000							
Nevada		1,180,695							
Utah		14,742,950							
Pennsylvania	121	471,300,884	56,194,047	54,922,898	2,258,831	.48	4.02	4.11	1.18
Montana	6	6,146,752	1,065,597	1,055,283	44,387	.72	4.16	4.20	1.53
Michigan	22	102,107,230	17,864,692	17,683,508	760,270	.74	4.26	4.30	1.24
California	35	441,280,546	34,845,771	34,080,579	1,487,425	.34	4.27	4.37	1.28
Oklahoma	17	17,995,050	1,449,278	1,443,842	64,924	.36	4.47	4.49	1.06
West Virginia	21	37,926,000	3,708,197	3,615,257	162,645	.43	4.39	4.50	1.39
Florida	10	11,149,100	1,969,315	1,968,990	97,517	.87	4.96	4.96	1.59
Arkansas	10	12,665,856	1,891,949	1,831,185	91,649	.72	4.84	5.00	1.64
Kansas	21	28,860,125	2,944,154	2,901,310	145,837	.51	4.95	5.02	1.31
Virginia	18	72,330,700	7,247,056	6,847,216	384,277	.53	5.31	5.61	1.93
Missouri	19	139,246,050	21,240,533	21,115,228	1,249,643	.90	5.87	5.91	1.72
Minnesota	9	55,899,200	9,685,158	9,675,508	612,291	1.09	6.32	6.33	1.87
Kentucky	10	39,262,150	6,155,248	5,919,344	376,922	.96	6.12	6.37	1.69
Ohio	75	350,573,490	40,706,038	39,437,574	2,525,422	.72	6.21	6 40	1.83
Wisconsin	24	72,297,920	8,648,124	7,846,593	504,665	.70	5.83	6.42	1.90
Georgia	14	82,930,000	7,421,747	6,934,010	447,864	.54	6.03	6.46	2.33
Colorado	16	56,183,680	6,630,450	5,829,146	377,718	.67	5.69	6.48	2.10
New York	101	870,790,850	123,523,376	118,672,650	7,735,345	.89	6.26	6.52	1.88
Rhode Island	10	33,158,700	14,457,064	14,308,385	949,516	.84	6.57	6.64	1.98
Connecticut		79,113,200							
Alabama	11	29,999,500	4,344,668	4,140,937	276,354	.92	6.37	6.69	2.08
Washington	19	136,216,008	13,590,933	12,706,499	858,974	.63	6.32	6.75	2.90
Tennessee	12	49,579,000	6,151,953	6,124,678	419,175	.85	6.81	6.83	2.21
New Jersey	24	171,689,176	18,321,483	18,081,276	1,254,842	.73	6.84	6.94	2.06
Delaware	25	10,553,200	17,318,667	16,619,698	1,165,421	.73	6.72	7.01	2.05
Maryland		96,342,800							
Dist. of Columbia		53,812,268							
Oregon	6	68,436,576	7,856,471	7,700,119	569,380	.82	7.14	7.28	2.87
Nebraska	7	35,223,276	3,618,337	3,577,746	265,735	.75	7.33	7.49	2.10
Louisiana	13	77,376,064	6,998.131	5,312,373	408,323	.53	5.83	7.68	1.87
Massachusetts	43	174,520,275	37,490,704	36,841,475	3,108,197	1.78	8.29	8.43	2.48
Illinois	67	407,351,547	55,899,544	54,588,533	4,885,069	1.20	8.74	8.94	2.43
United States. Total	975	$4,708,568,141	$585,930,517	$567,511,704	$35,027,965	.74	5.98	6.17	1.82
The Rhode Is'd Co.*	1912	$32,587,500	$5,139,940	$5,045,006	$374,337	1.15	7.28	7.42	2.58
	1913	32,587,500	5,452.179	5,322,747	421,026	1.29	7.72	7.91	2 75
	1914	32,587,500	5,523,807	5,379,149	453,388	1.39	8.21	8.43	2.86
	1915	32,587,500	5,205,893	5,084,137	468,560	1.44	9.00	9.22	2.94
	1916	32,587,500	5,604,658	5,484,875	487,162	1.50	8.69	8.88	3.04
	1917	32,587,500	6,031,000	5,913,074	534,623	1.64	8.86	9.04	3.25

* From preliminary report submitted by Sloan, Huddle, Feustel & Freeman.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME TAXES

VALIDITY OF OKLAHOMA ACT — NON-RESIDENTS. — The interesting and important question of the right of one state to tax the income of a non-resident, derived from sources within the state, has just been determined by the supreme court of Oklahoma in upholding the law of that state as applied to the income of a resident of Illinois, derived from oil leases operated in Oklahoma. The prevailing opinion rests the jurisdiction upon the protection given in the "production, creation, receipt and enjoyment of income." The decision seems to proceed largely upon the theory that an assumption of power, long exercised and not questioned, establishes the right to its exercise.

An interesting dissenting opinion was filed in which sharp issue is taken with the prevailing opinion and the argument made that to assume that as to residents one theory should apply and as to non-residents another, is to do violence to the plain provisions of the statute. Reliance is placed upon the fundamental necessity of jurisdiction of the *person* as a prerequisite to the imposition of an income tax, which is a purely personal tax measured by income irrespective of its source.

There is little reference to authority in either the prevailing or dissenting opinion and it is stated that this question has not as yet been authoritatively settled. This is doubtless true, and yet some light is thrown upon the probable view of the United States Supreme Court by the decision in *U. S.* v. *Erie Ry.*, 25 Fed. Cas. 1019, and the dissenting opinion in *U. S.* v. *R. R. Co.*, 106 U. S. 327.

This decision raises a question of great interest not only to the states but to those who are looking to the income tax for a solution of the difficulties of *situs* in the imposition of taxes under our federal system of government. An appeal will doubtless be taken, the result of which will be watched with interest.—*Shaffer* v. *Howard*, 250 Fed. 873.

Under the MASSACHUSETTS Income Tax Law imposing a rate of 6 per cent upon "money at interest" and a rate of 1½ per cent upon income "derived from business," interest received by a pawnbroker in the course of his business held taxable at the 6 per cent rate as upon "money at interest." *Goldman* v. *Trefry*, 120 N. E. 74.

The decision of the MISSOURI Supreme Court, upholding the income tax law, referred to in the October BULLETIN, is reported in 205 S. W. 196.

RELEASE OF INDEBTEDNESS AS INCOME—GIFTS.—In a recent case, the federal circuit court of appeals announces a decision of somewhat fundamental importance with reference to the meaning of income. In the case in question, one corporation controlling another released an indebtedness arising from a sale of properties to such corporation. The question was as to whether such cancellation of indebtedness constituted income to the corporation whose debt was thus canceled. It was held that the word income as used in the taxing acts "imports . . . the current distinction between what is commonly treated as the increase or increment from the exercise of some economically productive power of one sort or another, and the power itself, and it should not include such wealth as is honestly appropriated to what would customarily be regarded as the capital of the corporation taxed." Consequently it was held that the transaction amounted only to a contribution to capital account the same as if the stockholder had actually contributed money.—*United States* v. *Oregon-Washington R. & Nav. Co.*, 251 Fed. 211.

DIVIDENDS RECEIVED. — In *Skinner* v. *Union Pac. Coal Co.*, 249 Fed. 152, it is held that dividends constitute income in the year when received and are taxable as such in their entirety, though in part earned by the distributing corporation prior to the effective date of the income tax law.

PARTNERSHIPS.—In *Haiku Sugar Co.* v. *Johnstone*, 249 Fed. 103, it is held that a partnership composed of corporations is a partnership and not subject to income tax.

RECEIVERS.—Receivers of rents and income are not liable to make return of moneys received from property under their control, such not being income.—*Lathers* v. *Hamlin*, 170 N. Y. Supp. 98.

GUARANTEED DIVIDENDS.—In *Renss &c. R. Co.* v. *Irwin*, 249 Fed. 726, it is held, affirming the decision below (239 Fed. 739), that dividends paid directly to stockholders of lessor, as rental, are income to lessor under the income tax law of 1913.

ASSOCIATIONS. — A recent decision of some interest is that a common law trust, created to hold title to property from which the trustees were to collect the income and distribute it to the beneficiaries of the trust, comes within the definition of an "association" defined as a taxable entity by the income tax law of 1913. The test applied is as to whether the income accrues automatically, as it were, to the beneficiaries or whether action and discretion by the trustees is necessary. If the latter, the trust is taxable as such.—*Crocker* v. *Malley*, 250 Fed. 817.

UNIFORMITY—DISCRIMINATION

EXEMPTIONS — RATE LIMITS — LOCAL OPTION. — The uniformity clause in the *North Dakota* constitution is held not to require the taxation of all property on an *ad valorem* basis and is not violated by a law which provides a license fee in lieu of general and local taxes.

Another clause permitting exemption of personal property up to $200 is not violated by an act which provides for a license fee which will approximately equal a fair property tax if levied on an *ad valorem* basis.

The rate limitation of four mills was held applicable to *ad valorem* taxes and not to revenues derived from other sources and by other methods.

The constitutional clause requiring that all property shall be assessed in the locality where located, does not permit the localities to retain upon their tax lists all the property within their limits, in view of the general control by the state of the taxing power.—*State* v. *Wetz*, 168 N. W. 835.

CLASSIFICATION.—The repugnancy to the constitution on the ground of inequality or ununiformity of a tax, will not be inquired into by the court by evidence but must appear on the face of the act or from facts of which the court will take judicial notice. The legislature may classify persons and property and impose different burdens upon different classes based upon reasonable differences. A tax may be imposed on the intangible property of mutual insurance companies, leaving stock companies exempt, without violating the 14th amendment.—*Manufacturers' Mut. Fire Ins. Co.* v. *Clarke*, 103 Atl. 931.

LICENSE TAXES.—In *Union Sulphur Co.* v. *Reed*, 249 Fed. 172, it is held that a quarterly tax of ten cents per ton on sulphur, levied as a privilege of continuing operations, is a license tax and not a direct tax, and hence void for ununiformity as held in 73 So. 193 (see BULLETIN, vol. II, p. 179). Nor is it material that the complainant is the only person affected by the tax.

DISCRIMINATION AS TO COLOR—"COLORED" CORPORATIONS.—An act of Kentucky provides that none of the taxes raised from the property of a white person or corporation shall be used for the support of colored common schools and that the tax as raised from property of colored persons shall not be used for the support of white schools. It was held that the attempt to thus assign all taxes upon corporations to white schools was violative of the "equal protection" clause of the state constitution, the court observing that "a corporation cannot be said to have color; it is neither white nor black." — *Trustees* v. *Trustees*, 203 S. W. 520.

EXEMPTIONS.—The exemption of some from taxation while taxing others on the same kind of property, is not unconstitutional when the discrimination is founded upon public policy and is not arbitrary.—*Baltimore* v. *American Fire Ins. Co.*, 103 Atl. 980.

The uniformity clause in the TENNESSEE constitution was held violated by a pro-

vision in a special city charter, that not more than one acre of farm lands included within the boundaries of the city should be taxable. The charter was held void.—*Allen* v. *Board etc. of Smithville*, 205 S. W. 124.

INHERITANCE TAXES

The NEW YORK law imposing a transfer tax upon non-resident decedents' estates representing capital invested in business in the state is held applicable to one habitually engaged in making loans in the state, though acting through the agency of a corporation formed for the purpose of handling such activities.—*In re Green*, 171 N. Y. Supp. 494.

It is held that a person who died September 28 and hence was prevented by death from paying a personal property tax on his investments, the tax date being October 1, is not for that reason liable to the 5 per cent penalty tax imposed unless the personal representative is "able to prove that a personal property tax was assessed and paid on such investment . . . during the period it was held by decedent."—*In re Otis' Estate*, 170 N. Y. Supp. 1063.

Under the NEW YORK law, in determining the transfer tax on assets of a non-resident, only such proportion of debts due domestic creditors should be deducted as the taxable assets bear to the total assets.—*In re Ogden's Estate*, 170 N. Y. Supp. 630.

PENALTY TAX ON NON-REGISTERED SECURITIES.—A recent decision appears likely to extract the "teeth" recently placed by New York and other states in the securities tax law. By the New York statute in question, an additional transfer tax was imposed upon securities found in an estate upon which either the securities tax or the ordinary personal property tax had not been paid during the life of the decedent. The Surrogate's Court of New York County has just held this provision repugnant to the due process clause of the state constitution, in that it provides an unreasonable discrimination as between persons succeeding to the possession of property, dependent upon the mere circumstance of certain action on the part of the decedent. This decision seems decidedly worth consideration by those who have thus sought to stimulate the effectiveness of the registration tax upon intangibles.—*In re Watson's Estate*, 172 N. Y. Supp. 29.

FEDERAL ESTATES TAX DEDUCTIBLE AS AN EXPENSE.—The ILLINOIS Court has determined that the federal estates tax is a debt or charge against the estate and may be deducted from the gross value of the property transferred before the state inheritance tax is computed.—*People* v. *Pasfield*, 120 N. E. 286.

Shares in MASSACHUSETTS real estate trusts, owned by non-resident decedents, are held real property and subject to the succession tax.—*Priestly* v. *Burrill*, 120 N. E. 100.

LICENSE TAXES

For an extended discussion of licenses and charges for regulation as distinguished from occupation taxes as revenue measures, see *McMillan* v. *Knoxville*, 202 S. W. 65, and *Kansas City* v. *Holmes*, 202 S. W. 392.

AUTOMOBILES. — The requirement in a city ordinance of a $5 license was not, as a matter of law, a tax on property rather than a fee. The amount was not excessive in view of the normal expense of registration and inspection. — *Commonwealth* v. *Slocum*, 119 N. E. 687.

The power of a state to enact license taxes is not restricted to the purpose of permitting harmful occupations or for the preservation of good order or the public health or safety. It extends over useful occupations that they may be made to serve the public good; over such businesses as affect the public welfare and may be exercised to prevent fraud, deceit and unfair competition. So held in sustaining a license tax on creameries.—*Cofman* v. *Ousterhous*, 168 N. W. 826.

MISCELLANEOUS

JURISDICTION. — The waters of the Atlantic Ocean, adjacent to *New York* State, to a point three miles from shore, are within the jurisdiction of the state, subject to control for federal purposes, and the taxing power extends to property and franchises located or exercised within such area. So

held in construing an assessment of the special franchises of a telegraph company. —*Mexican Telegraph Co.* v. *State Tax Commission*, Weekly Reports, N. Y. State Depts., vol. 2, p. 1341.

Franchises.—Where the tangible property of a railroad company is assessed by the local assessor and the aggregate property by the state board, all of the property is reached. The local assessor cannot assess a local franchise, as being of value, because the state alone can grant such franchises.—*Cent. Ills. Pub. Serv. Co.* v. *Swartz*, 119 N. E. 990.

Franchises.—A state can tax the right to maintain a bridge though it be over a navigable river and be primarily for interstate and foreign commerce, the right to maintain it not being dependent solely on federal authority.—*People ex rel. International Bridge Co.* v. *State Tax Commission*, 170 N. Y. Supp. 997.

Corporation Franchise Tax. — The assembling and erection of machinery in a state and services of experts, such work being done in connection with an interstate contract, does not subject the corporation concerned to the regulations of the *Texas* statute concerning foreign corporations.—*York Mfg. Co.* v. *Colley*, 247 U. S. 21.

Corporation Franchise Tax — Corporation in Hands of Receiver. — In *Bright* v. *Arkansas*, 249 Fed. 950, it is held that a state tax upon the privilege of exercising the power to do business in a corporate capacity may be enforced even though the corporation be in the hands of a receiver. Note is made of the conflict in the decisions but it is held that the weight of authority is as stated, following *Coy* v. *Title Guar. & Trust Co.*, 220 Fed. 90.

Assessors as Constitutional Officers.—In many states attempts to increase efficiency in assessment have been made through reassessment statutes or through changes in the duties of assessors. These attempts have been rendered difficult through the fact that the assessor is a constitutional officer whose duties cannot be diminished. A way out of the difficulty is suggested by a recent *Arkansas* statute which provides that the county court of each county shall appoint two citizens in each township who, with the county assessor, shall constitute the board of assessment and valuation for the township. This statute is held not violative of the constitutional provision creating the office of assessor. The creation of an office does not prohibit legislative action varying the duties thereof. It is sufficient if the office be not abolished. —*Hutton* v. *King*, 205 S. W. 296.

Contracting Out Assessment Duty. —The assessment of property is a function of the duly constituted taxing officers, and mandamus will not lie to compel the payment for services, by one with whom the authorities made a contract to correct certain assessments.—*State* v. *Field, Co. Treasurer*, 172 Pac. 1136.

Railroad Assessments. — Under the *Kentucky* statutes, it is held that the omission of any element which reduces the valuation renders the company liable to the provisions for back assessment on "omitted" property as it is not an "undervaluation." In obtaining the state's apportionment on the basis of length of road "owned, leased or controlled", a "controlled" road is one in which the controlling company has sufficient stock to determine its policy and does not embrace one controlled through a pooling arrangement with other roads.—*L. & N. R. Co.* v. *Commonwealth*, 204 S. W. 94.

Exemption by Contract. — A statute granting exemption from taxation above a certain amount is a mere gratuity and not operative as a contract. The repeal of such a statute is not a violation of a contract. The leading cases are reviewed.—*People ex rel. N. Y. Central &c. R. R.* v. *Assessors*, 224 N. Y. 187.

"Tax Free" Contracts.—A covenant in a lease that lessee shall pay all rates, taxes and assessments, is effective to bind lessee to pay taxes imposed under laws afterward enacted during the lease.—*Ward* v. *Union Trust Co.*, 224 N. Y. 73.

Omitted Property. — A taxpayer may maintain a suit in mandamus to compel the assessment of omitted property and in such suit an assessment palpably inadequate and made without care and judgment, will be

treated as no assessment. — *Elam* v. *Salisbury*, 202 S. W. 56.

Property Taxable. — Property is not exempt from taxation merely because it is difficult of assessment or because taxing officials have customarily omitted it from assessment, when the statute or constitution plainly includes it as taxable. So held in enforcing an assessment upon a judgment.—*Pryor* v. *Marion County*, 204 S. W. 1152.

Situs.—The action of North Dakota in enacting in 1917 a so-called "business situs" law for the taxation of intangibles of non-residents, based upon the Louisiana statute, was naturally of more than usual interest to tax students. This law has just been tested in a case where the attempt was made to tax a non-resident on account of notes, bonds, and negotiable instruments arising from loans made to residents. The court in an elaborate opinion and after reviewing generally the cases on *situs* and jurisdiction, declares that the intention of the legislature was not to subject all credits owing by residents to non-residents to the tax but only such as arise in a regular business done by the non-resident in the state.

In a dissenting opinion, one justice raises the interesting question as to the effect on a general constitutional tax limit of such a special tax on securities. He holds that such a special tax rate is in violation of the constitutional provision.

Another justice renders an elaborate opinion supporting the law as contended for by the State Tax Commission.—*State* v. *Packard*, 168 N. W. 673.

Shares of Foreign Corporations.—Under the *Pennsylvania* statute (P. L. 1913, 507, 508) shares of stock are taxable in the hands of resident shareholders "except shares . . . in any . . . corporation . . . that may be liable to a tax on its shares or its capital stock for state purposes . . . or relieved from the payment of tax on its shares or capital stock . . . by the laws of the Commonwealth."

The question was as to whether this exception provided total exemption of shares of a foreign corporation when only a part of its capital was employed in Pennsylvania or was exempted in part because a manufacturing company, or whether the shares were exempt in proportion to the extent that the company paid a tax in Pennsylvania. It was held that the shares were totally exempt.—*Dupuy* v. *Johns*, 104 Atl. 565.

Is Land Indestructible. — That the existence of land may in some cases prove doubtful, is shown by a recent case in which an owner's title, asserted through tax deeds, was attacked on the ground that the erosion of a river having washed away the land, the adjoining land became riparian, and although subsequently the process was reversed, and the land restored, the new riparian owner became the owner of the land so restored. Very respectable authority was adduced in support of this proposition, but the North Dakota court held otherwise and that the deeds were valid to give title to the original owner.—*Allard* v. *Curran*, 168 N. W. 761.

Gross Receipts — Interstate Commerce—Foreign Corporations.—Further affirmance has recently been announced of the settled doctrine of the U. S. Supreme Court that a gross earnings tax, levied upon intrastate and interstate receipts, in lieu of a property tax, is not repugnant to the commerce clause. It is held further that the tax laws of a state may provide different burdens upon foreign than upon domestic corporations, and on this point interesting comment is made on the decision in *Southern Railway* v. *Greene* (216 U. S. 400) tending to explain and limit that decision as applying to railroad property, not susceptible of other uses. — *Northwestern Mut. Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132.

Special Assessments — Railroads.—Held that an assessment for benefits derived from resetting the curb and asphalting the street adjoining railroad property must be based upon the actual benefit to such land for railroad purposes and not upon either a general or special enhancement in the market value of the land.—*Erie R. Co.* v. *Passaic*, 103 Atl. 855.

Penalties.—Under a statute providing for the assessment of an annual registration fee upon corporations and for payment thereof and that default of such payment shall, without further proceedings, operate as a forfeiture of the charter, an assessment

is necessary and the corporation cannot assert the expiration of its charter for its own default, as avoiding a subsequent assessment covering the years of such default. The tax cannot be considered as imposed until the assessing officers have acted, even though the fee was plainly to be computed upon the statute by the application of the prescribed schedule of fees. Failure to report does not work a forfeiture.—*Elliott's Knob Co.* v. *Corporation Commission*, 96 S. E. 353.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

BANKERS TRUST COMPANY. Tax saving through subscription for Fourth Liberty Loan bonds. 1918. 7 p.

BANKERS TRUST COMPANY. Twenty-four billion. 1918. 31 p.

Contains suggestions for the equitable apportionment of the year's expenses among the 23,500,000 families in the United States.

CALIFORNIA. State Board of Equalization. Revenue laws in force on January 1, 1918, and citations from decisions of the Supreme and Appellate Courts affecting revenue laws. Sacramento. 1917. 534 p.

DONAHEY, A. V. Limit bond issues as well as tax levies. *Ohio Journal of Commerce*, XIV, 4 (April 1, 1918), p. 43.

Mr. Donahey, the auditor of state, points out the enormous growth of public debts in Ohio, defends the Smith tax limitation law, and urges the extension of the principle of limitation to the creation of debt. He closes with some pertinent remarks upon economy in public administration.

MARRIOTT, J. A. R. National expenditure. *The Edinburgh Review*, vol. 228, no. 465. (July, 1918.)

This article is based upon half a dozen reports from a special committee of the House of Commons, appointed to investigate the subject of British war expenditures. The delicate balance of the British budget has been seriously disturbed by reason of the collapse of the ordinary peace-time agencies of control. The Treasury, which is ordinarily the principal agency of control, has become a great spending department, and it has failed to apply the customary standards of efficiency and economy to these new services which have been created. The principal criticism has been levied against the Ministry of Munitions, in the supervision of which the Treasury has been exceedingly remiss. The select committee concluded that in many instances it would have been possible, without injury to the public interest, to prepare and present estimates to Parliament. There appears to be general doubt whether the House of Commons has any inclination toward economy. The mere submission of estimates, however, and their discussion, would, in the committee's judgment, be an influence toward economy. Unless the Treasury assumes greater responsibility than has hitherto been displayed, there is little chance for improvement.

It is impossible to avoid the feeling, as one reads of the breakdown under war conditions of a budgetary system so vastly superior to our own, that the reform of the federal system of appropriation and expenditure is the most pressing financial problem of the hour in the United States.

OHIO. State Tax Commission. Annual report for 1917. Columbus, 1918. 231 p.

This report covers the first year of experience under the new system of property assessment, whereby each taxpayer is required to make a return to the proper officials instead of receiving a call from the assessor. The Commission acclaims this law as the best in the history of the state, and asserts that only minor defects have appeared in its operation thus far. The total increase in the duplicate was $845,103,000, the largest increase in any year except 1910-11. The increase was rather evenly divided between real estate and personal property.

The Commission's estimate of the tax law may be correct enough, judging from the results. It is unfortunate, however, that this estimate is given such unqualified expression, since it will doubtless be construed by many to mean that only minor changes in the tax law are required. In accounting for the phenomenal increase of the assessed valuation of property, the Commission recognizes the influence of the vast increase of wealth in the state; and some idea of this factor may be had from a consideration of the amounts by which the classes of intangibles were increased. Thus, moneys were increased by $46,200,000, credits by $120,500,000, and bonds and stocks by $3,200,000. In view of the well known increases in the wealth of individuals and corporations, is it very doubtful if intangibles have been assessed under the new law on a higher proportion of full value than in former years?

PIGOU, A. C. A special levy to discharge war debt. *The Economic Journal*, XXVIII, 110 (June, 1918).

Professor Pigou's article attempts an estimate of the amount of capital and the rate of levy that would be required in connection with the proposal by the British labor party for a special tax or levy on capital as the best method of retiring the war debt.

PLEHN, C. C. Substance and shadow in war finance. *American Economic Review*, VIII, 3 (September, 1918). 564-578.

A discussion of the real and the money costs of the war.

TEXAS. Ninth report of the tax commissioner, for the year 1917. 68 p.

UNITED STATES. Bureau of the Census. Specified sources of municipal revenue, including special assessments, business taxes other than on the liquor traffic, general license taxes and license taxes on dogs, in cities having a population of over 30,000. Washington. 1918. 140 p. tables.

UNITED STATES. Bureau of Internal Revenue. Preliminary statement on internal revenue collections, fiscal year 1918. Washington. Government Printing Office. 1918. 11 p. tables.

UNITED STATES. House of Representatives. Hearings before the committee on ways and means on the proposed revenue act of 1918. Washington. Government Printing Office. 1918. 3 parts. 2242 p.

This is the complete record of the public hearings on the new revenue bill.

WOODWARD, K. W. Taxation of woodlots. New Hampshire College Extension Service. *Extension circular* no. 39 (April, 1918). 19 p.

Contains a statement of the forest tax situation in New Hampshire, a brief summary of legislation of other states, and a very complete and valuable bibliography.

WOODWORTH, LEO DAY. Necessity of safeguarding realty mortgages. *Real Estate and Builders Record and Guide*, CII, 8 (August 24, 1918), 207-208, 215.

A protest against attacks upon realty values, in the interest of the investor in mortgages.

THE NATIONAL TAX ASSOCIATION

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CONFERENCE POSTPONED AGAIN

The cruel fates seem to be pursuing us this winter, although we are not aware of any grievous crimes for which we should be thus punished. As we went to press last month we were just staggering under the first blow, and now comes the second one. A telegram received on December 5th from our St. Louis friends informed us that the influenza epidemic, which had already caused one postponement of the conference, had broken out again and that the board of health had forbidden all public meetings. The officers, after a hurried consultation, saw that there was obviously nothing to do but once more call off the conference. Notice was sent next day to all members, delegates, and speakers, and vigorous measures were taken to spread the news broadcast. We hope that timely notice has thus been given to everyone who was planning to attend the conference.

The career of the twelfth conference has thus far been a stormy one. Plans for the meeting at St. Louis during the week of November 12 were maturing nicely when the sudden outbreak of the influenza epidemic called a halt. After careful consideration the executive committee decided to try again, this time for the week of December 16, and things were coming along well, when the blow fell again. Don't tell us that lightning never strikes twice in the same place.

However, we must cheerfully accept the situation and once more make plans for the future. The secretary has written to each member of the executive committee asking for suggestions. All this happened only a few days before we went to press, so that we are unable now to give further information as to what will be done. In the meantime, we repeat our former urgent invitation to every member to give the matter serious thought and send his ideas to the treasurer (195 Broadway, New York City). Our sincere regrets are hereby extended to those who were to have honored us by appearing on the program, and we beg of them not to put the matter from their minds but to hold themselves in readiness for a call in the near future. Full information as to the decision made will be given in the January BULLETIN, or by mail if earlier notice is necessary.

SHOULD THE EXCESS PROFITS TAX BE DEDUCTED IN COMPUTING THE NEW YORK FRANCHISE TAX ON MERCANTILE AND MANUFACTURING CORPORATIONS?

HENRY M. POWELL

Formerly Counsel to the New York Joint Legislative Committee on Taxation

The New York State franchise tax law imposing a tax of 3 per cent on the net income of manufacturing and mercantile corporations, passed by the New York legislature in 1917 and amended in 1918, has presented some new problems to vex the corporation lawyer, and until the courts have finally passed upon them, or the legislature appropriately amended the moot points in the new law, there will be much discussion and doubt as to the construction to be given to the statute.

The question that has attracted more controversy than any other is whether, in computing the state franchise tax of 3 per cent on the net income of corporations, the excess profits tax paid to the United States Government should be deducted before the state tax of 3 per cent is determined. The doubt that has been occasioned in this respect is due largely to the phraseology in section 209 of the New York statute. In 1918 this section of the statute was amended so that it reads as follows:

The section in dispute

SECTION 209. Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic manufacturing and every domestic mercantile corporation, and for the privilege of doing business in this state, every foreign manufacturing and every foreign mercantile corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November 1 next preceding an annual franchise tax, to be computed by the tax commission upon the basis of its net income for its fiscal or the calendar year next preceding, as hereinafter provided, [upon] which income *is presumably the same as the income upon which* such corporation is required to pay a tax to the United Staes.

The word in brackets was left out in the new statute and the italicized words inserted.

The confusion that has arisen in relation to the construction of the statute is largely due to the fact that the original New York law provided that the tax be based on the net income "upon which such corporation is required to pay a tax to the United States." Both the federal income tax and the federal excess profits tax are based on a report of "net income on which corporations are required to pay a tax to the United States." In the case of the federal income tax, the *excess profits tax* is deducted before calculating the amount upon which the corporation is required to pay a tax to the United States. This is done in accordance with section 29 of the federal income tax law of September 8, 1916, as amended by the act of October 3, 1917, which reads as follows:

> In assessing income tax, the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by act of Congress and assessed for the same calendar or fiscal year upon the taxpayer.

The excess profits tax, however, is determined on the whole amount of net income returned by the corporation. The state tax commission has made a ruling that the net income which the New York law required to be returned as the basis of the tax, is the "*total* net income required by answer no. 8 in form no. 1031, of the federal corporation income tax return, from which the excess profits tax has not been deducted."

Reasons why the Excess Profits Tax Should be Deducted

Lawyers and accountants representing corporations, which, under this ruling, would be obliged to pay heavy taxes on their entire net income including the charge represented by the excess profits tax, objected to this decision of the state

tax department on the ground that it was not a fair construction or interpretation of the statute. They contended that at the time the state income tax law was passed on June 4, 1917, the only federal act upon which an income tax was paid to the United States Government was the federal act of September 8, 1916; that this federal act provided that in arriving at the net income, the federal income tax should be deducted; that there was at that time no excess profits tax payable to the federal government; that the federal act of October 3, 1917, was passed and amended the income tax act of 1916 by providing for an excess profits tax in addition to the income tax; that the amended federal act provided that in arriving at the taxable net income, the income taxes should *not* be deducted, but that the excess profits tax should be deducted; that since it was the intention under the amended state law of 1918 to tax *all* manufacturing and *all* mercantile corporations, obviously it could not refer to the excess profits tax act of October 3, 1917, as that act did not apply to all corporations but only those whose net income exceeded 7 to 9 per cent of the invested capital, plus three thousand dollars; hence, that a proper construction of the New York statute of 1918 as to the amount to be returned to the state tax department upon which a tax was to be based, should be the net taxable income under the federal income tax act of October 3, 1917, providing for the deduction of the excess profits tax.

Is the Paragraph in Dispute Modified by Subsequent Sections?

The crux of the inquiry is to ascertain from the New York statute whether the legislature intended that the tax should be levied on the *entire* net income which is used as the basis of the excess profits tax, or whether it should be levied on the entire net income less the excess profits tax under the federal income tax law of October 3, 1917.

If reliance is placed alone on the words used in section 209 of the tax law for a construction of the New York statute, there appears to be very much force in the claim for a deduction of the excess profits tax, but to understand the position of the state tax commission, one must examine the entire series of acts passed in 1917 and 1918, which make up Article ix–a of the tax law, known as the "Franchise tax on manufacturing and mercantile corporations," and also look for light on this point to other sections of the tax law which relate to, or have any bearing on, the subject.

It will be noticed that section 209 of the tax law above quoted provides that the tax shall be computed on the basis of the net income "as hereinafter provided." The expression "as hereinafter provided" refers to the provisions contained in sections 211, 214, 219-d, 217 and 195 of the tax law, detailing the method of making reports, the computation of the tax, and how the net income may be ascertained by the tax commission when the federal report is changed or corrected, or when no federal or state report is made.

Section 211, consisting of eight subdivisions, outlines the method by which a corporation reports to the tax commission the facts upon which the net income is to be computed, and the tax to be apportioned among the various localities in the state. Subdivision 2, of this section, provides that among the facts to be reported by the corporation are:

> 2. The amount of its net income for its preceding fiscal or the preceding calendar year as shown in the last return of annual net income made by it to the United States treasury department, *and if the corporation shall claim that such return is inaccurate, the amount claimed by it to be the net income for such period.*

The italicized words were first used in the 1918 law.

Subdivision 8 of the same section provides:

> 8. Any corporation taxable hereunder may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income.

Subdivisions 4 and 5 relate to the value of real and personal property located in and out of the state.

Section 214 of the tax law provides for the computation of the tax based upon the report made under section 211 of the law. Paragraph 1 of section 214 reads as follows:

> § 214. Computation of tax. If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to

the United States treasury department, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission.

The second paragraph of this section provides:

> If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such ascertained net income, to be determined in accordance with the following rules:
>
> The proportion of the net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of
>
> 1. The average monthly value of the real property and tangible personal property within the state. . . .

In the citation from section 211 above quoted there is a requirement that the net income to be shown in the said report as the basis on which the computation of the tax under section 214 of the tax law is to be made, shall be

> "the net income . . . as shown in the last return of annual net income made by it to the United States treasury department, and if the corporation shall claim that such return is inaccurate, the amount claimed by it to be the net income for such period."

It would seem from a careful reading of this section that the return of net income as reported by the corporation, and the determination of net income by the treasury department, are used in a somewhat similar sense or interchangeably, since it may be assumed that a corporation would not make an inaccurate return to the treasury department (for which it would be punishable under the federal statute) and then ask the state tax commission to be permitted to correct its return of net income as inaccurate. A reasonable construction of this paragraph would be that if the net income *as returned* was not changed by the treasury department, it would then become the net income *as determined* by that department. If the amount returned to the treasury department is changed or corrected, provision is made in section 219-d for notifying the state tax commission of such further determination.

It should also be borne in mind that the original New York law passed in June, 1917, had reference to the federal return of 1916 from which no excess profits tax could be deducted, because it was not then in existence. Bearing this in mind, one can more easily understand the reference in subdivision 8 of section 211 of the New York tax law above quoted, which provides that a corporation may consent to be taxed on its "entire net income" if it prefers to omit the details as to its assets in and out of the state required by subdivisions 4 and 5 of the same section. The "entire net income" as *returned* by the corporation and the "entire net income" as *determined* by the treasury department, if not changed or corrected by the treasury officials, is one and the same thing under the 1916 federal law. This would also clarify the statement in paragraph I of section 214 above quoted, that if the corporation's entire business is transacted in New York State, the tax "shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States Treasury Department." If it were intended to permit a deduction of an excess profits tax amounting in many cases to 50 or 60 per cent of the entire net income, the phrase that a corporation might be taxed in certain cases upon its "entire net income," would be more or less meaningless.

Under the United States income tax act as amended, the return of net income in the case of corporations subject to an excess profits tax became what may be called a "double-barreled" return. The "entire net income" or "total net income," as it is called in the 1917 federal return, became the basis of both the excess profits tax and the federal income tax as amended. The "total net income" is the same in each case although the amount on which the tax is imposed for the income tax is lessened by the excess profits tax. Otherwise, a tax would be imposed by the same sovereignty on a tax already levied.

Why the New York Law was Amended

There was a serious question as to the constitutionality of the original state franchise tax law as passed in 1917. It was the intention of those who drew the original act to make the federal income tax return the basis for computing the state franchise tax, and no provision was contained in the original act for ascertaining the true net income, in case a corporation contended that its net income as determined by the United States treasury department was inaccurate, nor was there any method laid down in the original act for ascertaining

the amount of net income. In other words, the assessment of net income was entirely fixed by the federal return, except in cases of fraud, evasion, or error, in which event the state tax commission might ascertain the net income for itself. Nothing else was taken from the federal return under the New York law of 1917, other than the amount of net income as returned to, or determined by, the treasury department. A copy of the federal return itself was not made part of the state return as under the Connecticut and Massachusetts corporation income tax laws hereinafter referred to, so that there was no method or rule adopted under the original New York law by which the net income could be ascertained.

The amendment of 1918 aimed to avoid the constitutional objection that the state had deputized its assessing powers to the federal authorities, and that corporations without their consent could be taxed and deprived of their property without due process of law. The amendment therefore provided that if the corporation claimed that the income returned to, or determined by, the federal government was inaccurate, it might give the net income which it claimed to be correct, and the amendment further provided that the act shall be construed as having been in effect as of the date of the original enactment of the 1917 law. The amendment of 1918 contains a further clause in section 219-d of the tax law, as to the ascertainment of net income where it had been corrected as originally returned to the treasury department by the commissioner of internal revenue or other official or competent authority, and where the corporation "shall concede the accuracy of such determination or state wherein it is erroneous."

Sections 219-d, 217 and 195 of the tax law confirm the view that "total net income" without deduction of federal taxes was to be the basis of the state tax.

§ 219-d. CORRECTIONS AND CHANGES. If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, *and shall concede the accuracy of such determination or state wherein it is erroneous. The tax commission shall ascertain, from such return and any other information in the possession of the commission, the net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of section one hundred and ninety-five of this chapter is hereby granted to it in respect to the ascertainment of such net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the net income for such fiscal or calendar year, such reaudit to be according to the net income so ascertained by the tax commission.*

The italicized words in the above paragraph first appeared in the amendment of 1918.

Section 217 as to the powers of the tax commission provides:

§ 217. POWERS OF TAX COMMISSION. The tax commission may for good cause shown extend the time within which any corporation is required to report by this article. If any report required by this article be not made as herein required, the tax commission is authorized to make an estimate of the net income of such corporation and of the amount of tax due under this article, from any information in its possession, and to order and state an account according to such estimate for the taxes, penalties and interest due the state from such corporaion. If the tax imposed upon any corporation under this article is based upon an estimate as provided in this section, the tax commission shall notify such corporation of a time and place at which opportunity will be given to the corporation to be heard in respect thereof. Such notice shall be mailed to the post-office address of the corporation. All the authority and powers conferred on the tax commission by the provisions of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder.

Among other powers conferred upon the tax commission by section 195 of the tax law, are the following:

The commission shall also have power to examine or cause to be examined, in case of a failure to report or in case the report is unsatisfactory to it, the books and records of any such corporation, joint-stock association, company, foreign banker, person or partnership, and may hear testimony and take proofs material for its information, and may appoint a commissioner by a written appointment under its official seal for that purpose. Every commissioner so appointed shall be authorized to make such examination and take such testimony and hear such proofs and report the proofs and testimony so taken and the result of his examination so made and the facts found by him, to the commission. The commission shall, therefrom, or from any other data which shall be satisfactory to it, order and state an account for the tax due the state, together with the expenses of such examina-

tion and the taking of such testimony and proofs. Such expenses shall be fixed and adjusted by the commission.

Is there anything in sections 219-d, 217 or 195, all of which have been quoted at some length, that will corroborate the view that the "net income on which the corporation is required to pay a tax to the United States" under section 209 of the tax law, means something else than the total net income which it first reports to the United States treasury department before the excess profits tax is deducted?

To sustain this interpretation, words must be read into the statute that it does not now contain. If the word "income" should precede the word "tax," so that the phrase in section 209 would read "net income upon which such corporation is required to pay an income tax to the United States," there would be some corroboration of this construction which would not be free from doubt in view of the phrase "entire net income" in sections 211 and 214 of the statute. If the phrase in section 219-d should read "net income upon which such corporation is required to pay a tax to the United States under the federal income tax law of 1917," there would be firmer ground for this view.

Attention has heretofore been directed to sections 211 and 214 of the tax law calling for the report of a corporation to be made to the state tax commission, and for the computation of a tax upon this report based on the return to the treasury department. The difficulty of the inquiry lies in the fact that the "net income" referred to under sections 211 and 214 is the net income ascertained by the treasury department, which may or may not be construed as having reference to a net income from which the excess profits tax has been deducted. It may be conceded, however, that the "net income" referred to in sections 217 and 219-d of the tax law, as well as the reference thereto by innuendo in section 195 of the tax law, is the net income of sections 209, 211 and 214. Now, it would appear under section 219-d that the New York tax commission has power to ascertain the net income for itself, not only from the corrected federal return, but from "any other information in the possession of the commission." It would also appear under section 217 and section 195 that where no report is made by the corporation or an unsatisfactory report is filed the state tax commission *must* itself ascertain the net income. In cases where corporations made no report to the federal government, is it at all reasonable to assume that the legislature intended that the state tax commission should first make an assessment for the excess profits tax, most difficult and complicated in its character, and then make an assessment for its own purposes of net income under the state law? If corporations liable to an excess profits tax failed to make a report to the federal government, there is no authority in the statute giving the state tax commission the power to estimate the excess profits tax that would have been imposed by the United States Government had such corporation made a report in due time.

It will be seen that while the tax commission sought the advantage of any redetermination by the federal authorities, *it was only for the purpose of information*, and the amendment provided in this case for the ascertainment by the commission on its own authority of the true net income of the corporation irrespective of any determination by the federal authorities. Now, the New York law clothes the state tax commission with full powers to cover a case of this kind. Under section 195 the state tax commission has authority to go into the merits by examining the corporation's officers and books and fixing the actual net income. The whole purpose of using the federal return was to do away with the complicated and expensive machinery which the state would require if it were obliged in every case to review the various items of gross income, general expense, depreciation deductions, etc., before it could determine the net income. In the amended statute, the rights of both the corporation and the state are preserved so that neither is concluded by an incorrect return to the federal government, nor by its determination. In the exceptional cases where no returns are made by a corporation to the state, or to the United States, "the tax commission is authorized to make an assessment of the net income of such corporation, and of the amount of tax due under this article, from any information in its possession." Whether a report is or is not made to the state tax commission, or to the United States treasury department, or when the report of net income is unsatisfactory to the commission,

or when, on the other hand, under the amendment of 1918, the determination of net income by the United States is unsatisfactory to the corporation,—in any of these cases the tax commission may ascertain such net income from the books of the corporation, or from testimony, or from any other appropriate source, and it is not at all limited under our New York statute by the federal laws and rules for ascertaining the net income "on which the corporation is required to pay a tax to the United States." In this respect it differs from the Connecticut and Massachusetts state income tax laws, which follow the federal law.

The New York Law is Not an Income Tax

The New York statute imposes a franchise tax, not an income tax; the New York law imposes a tax on a domestic manufacturing corporation or a domestic mercantile corporation "for the privilege of exercising its franchise in this state in a corporate or organized capacity," and in the case of a foreign manufacturing or foreign mercantile corporation, "for the privilege of doing business in this state." It is part of the system in this state for taxing corporations on their franchises. In the present case, the tax is measured according to the ruling of the state tax commission by the *entire* net income of the corporation for the past fiscal or calendar year. It might have been measured in any other convenient way, for the legislature had entire control of the subject; for instance, transportation companies in this state pay an annual franchise tax on gross earnings; insurance companies, an annual franchise tax on gross premiums; trust companies, a franchise tax on capital stocks and undivided profits; savings banks, an annual franchise tax based on surplus or undivided earnings. Clearly, the legislature might have elected any reasonable basis of computation that it deemed desirable.

Recent Decisions

Two recent decisions of sister states are worthy of notice. The first is the opinion of the attorney general of Connecticut, dated March 1, 1918, in relation to the Connecticut income tax law of 1915, and the other is a decision of the supreme court of Massachusetts, in *American Printing Co.* v. *Commonwealth of Massachusetts*, construing the net income tax on corporations, reported in 120 N. E. 686. Both decisions permit a deduction of the excess profits tax. The Massachusetts income tax law is almost identical with the Connecticut law, and in both cases it was required that every corporation should render to the tax commission "a true copy of the last return made to the collector of internal revenue, of the annual net income . . . and such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of *net income taxable under the United States income tax act;* the net income of such corporation after making the deduction authorized." The laws of each of these states requires a tabulation of all the particulars by which the United States arrives at the net income subject to the tax, and appropriates it as part of its own method of computing the net income. No opportunity for correction or change is permitted either by the corporation or by the tax commission of those states. The treasury department ruling is binding on that point. The main points of difference are: (1) that the Massachusetts and Connecticut laws are income tax laws and based on net income; (2) that the wording of the Massachusetts and Connecticut acts is essentially different, being based on "net income taxable under the United States income tax act"; (3) the New York law uses the result of the federal return as far as the total net income is concerned, for the purpose of information only, but reserves to itself the right to ascertain what is net income, while the Connecticut and Massachusetts laws leave no discretion in the tax commissioner but oblige him to accept the net income as determined under the federal rules and regulations.

Summary

1. Section 209 of the New York tax law provides for a tax based on the "net income . . . upon which such corporation is required to pay a tax to the United States." Under the original New York law of 1917, which had reference to the return of net income under the federal law of 1916, the net income returned was the *total* net income or *entire* net income from which no excess profits tax was deducted, because not then in existence. The amendment to the New York law in 1918 presented no indication that such a deduction was author-

ized. To give it such a construction, words must be read into the statute that are not there now. The total net income or entire net income whether returned for income tax or excess profits tax still remains the basis of assessment. A corporation paying no excess profits tax returns its total net income for income tax payment, and a corporation paying excess profits taxes returns its total net income, on which it pays a tax to the United States.

2. The wording in section 209 of the New York law is governed by the phrase "hereinafter mentioned," which in turn is limited by the application given to it in sections 211 and 214 providing for a tax based on "entire net income," and also by the application of sections 217, 219-d and 195 of the tax law requiring the net income to be ascertained by the tax commission in some cases where no federal return is made at all, and hence where no excess profits tax could be deducted.

3. The New York tax is a franchise tax and not an income tax and may be measured by total net income, whether returned for income tax or excess profits tax purposes.

4. The New York tax law being a state revenue measure, should be liberally construed in favor of the public treasury.

Attention is called to the department of *Decisions and Rulings*, at page 83 of this issue, where Mr. Holcomb discusses this same question, with special reference to the Massachusetts decision.—THE EDITOR.

POST-BELLUM FISCAL PROJECTS IN GREAT BRITAIN AND FRANCE

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Much interest has been aroused by the almost simultaneous appearance in Great Britain and France—and for that matter also in Germany—of the project of financing the post-bellum period and wiping out or reducing the enormous national debt by means of what has been called the capital levy or the conscription of wealth. In England, almost two entire issues of the *British Economic Journal* have been devoted to this question, the summer number including articles by Professor Pigou and others in favor of the plan, the autumn number being given up to articles by opponents of the scheme, such as Professor Scott and others. A more elaborate discussion of the project may be found in two books that have recently appeared. One of these is by F. W. Pethick Lawrence and is called "A Levy on Capital." [1]

Mr. Pethick Lawrence begins with chapters on the cost of the war and on raising the funds for meeting war expenditure, avoiding, however, the controversy as between loans and taxes. These are followed by several chapters on pre-war wealth and the changes due to the war. Mr. Pethick comes to the conclusion that the wealth of Great Britain before the war was about 15 billion pounds, of which the private wealth of individuals was 12½ billions distributed as follows: 2 per cent of the population possessed 64 per cent of the wealth; a further class of 11 per cent another 24 per cent, leaving the remaining class of over 40 million people with 12 per cent of the wealth. As a result of the war, with its inflation and profiteering, Mr. Pethick finds that the gross wealth of the country has increased to 18,900 million pounds, of which 15½ billions represent private wealth; but as the net debt is about 6 billions, this would leave the national wealth at 12,900 millions, showing a loss of over 2½ billions as a result of the war. This, however, does not represent even the material cost of the war, for a great part of the cost has been met out of income, while the people have not only worked harder but have stinted themselves. Mr. Pethick calculates that, in addition to the 2½ billions which have been paid out of capital, about 4 billions have been paid out of income. Since, however, the aggregate increase in the nominal value of individual wealth is,

[1] *A Levy on Capital*, F. W. Pethick Lawrence. London, George Allen and Unwin Ltd., 1918, 94 pp.

as stated above, at least 2½ billions, the result is that the distribution of wealth in Great Britain is still more unequal than it was when the war began, for in Great Britain (he thinks) it is beyond all doubt that the war loans have been taken largely by the wealthier classes and bought to a very considerable extent out of profits on war contracts.

Mr. Pethick next proceeds to consider the proper peace budget. His own calculation is that, even if all existing war taxes (except of course the tax on war profits which automatically ceases with the war) are continued, there will still be an annual deficit of at least 125 million pounds. He eliminates as impracticable any new taxes except a doubling of the death duties and an increase of the normal income tax to 7s. 6d. in the pound (37½ per cent). This he considers a quite unendurable prospect. Even if Mr. Bonar Law's more optimistic forecast be accepted, all the present heavy war taxes will have to continue indefinitely. As this will also be deemed a very great hardship, the author maintains that we are driven to a choice between repudiation and a capital levy, and he prefers the latter. To sweep away the whole of the debt would require a capital levy so graduated that £1,000 would be taxed 9 per cent; £10,000, 26 per cent; £100,000, 44 per cent; and £1,000,000, 62 per cent. If it seems better to wipe out only a part of the debt, the figures can be reduced proportionately. The advantages of the plan he sums up as follows:

"The effect of a levy on capital will be to wipe out the whole or part of the debt and to give the state a financial interest in certain national enterprises. It will bring about partial deflation. It will not change the total aggregate of the wealth of the country as a whole, but will change its distribution. It will make it possible to balance the budget and reduce direct taxation. In this way business men with moderate incomes will find the levy much less hindrance to their business than the heavy income tax which will otherwise have to be imposed. The persons who will feel the weight of the levy most heavily will be the men of great wealth and those living without personal exertion on the proceeds of their investments."

In a supplementary chapter he discusses the objections to the proposal.

Several of these arguments are met by Mr. W. H. Mallock in his book entitled "Capital, War and Wages,"[2] a part of which is devoted to the so-called conscription of wealth. Mr. Mallock discusses in turn the various kinds of capital and the results of conscribing each. The only way, in his opinion, in which the government could gain by conscribing capital in the form of houses would be to compel the occupiers, as soon as the rents were remitted, not to spend them on their own gratifications, which would be only a clumsy variant of the process of raising the same sum by an income tax. As to all other forms of productive capital, the state, by conscribing capital, could gain nothing which it does not gain by special taxes on income. To this general principle Mr. Mallock thinks there are only two exceptions. Capital might be turned into income either by neglecting repairs or by consuming food reserves without replacing them. The net result of the whole plan of conscription of capital, according to our author, would be that the more efficient citizens who at present produce the greater part of capital would be robbed of nearly the whole of the future advantages which their present savings now promise to themselves; and the less effective workers, who alone would gain anything, will profit by an addition of not more than a twentieth to their present total incomes. The remainder of the book deals with the problem of wages, in which perhaps the most interesting suggestion is that the best promise of the future is to develop the "great volume of alacrity which is latent in the laborers and which would, if fully exerted, increase the total product of the country immensely." This he thinks can be accomplished by a change in methods of remuneration.

A more elaborate work than either of these is the French book of Dr. Just Haristoy.[3] In the preface the author calls attention to the fact that the long-continued repugnance of the French to the income tax has finally been overcome by the war. The war, he tells us, has brought about the

[2] *Capital, War and Wages.* Three questions in outline. W. H. Mallock. London; Blackit and Son, Ltd., 1918, 86 pp.

[3] *Finances d'apres-Guerre et Conscription des Fortunes.* Par Just Haristoy. Paris, Felix Alcan, 1918, 158 pp.

ineluctable necessity of the income tax, and the same inevitability will be true of the capital levy. M. Haristoy begins his book with an account of the war expenditures and the war debt of France. The total French debt at the end of 1917 was over 129 milliards (or, as we should say, billions) of francs, of which the war debt alone amounted to 95½ milliards. By the end of 1918 this will have been substantially increased. Taking the former figures, however, the peace budget would require an addition of from 10-12 milliards, and since there is no practicable way of raising this immense sum from taxation, the remaining alternatives are either repudiation or what the author calls the conscription of wealth. This is the last of the three forms of necessary conscription during a war: the first being military mobilization, the second mobilization of charity, the third conscription of wealth. The author then proceeds to work out his plan in detail. The project rests upon several principles. First the tax is to be levied only on the wealthier classes. This means that it is to begin only with 10,000 francs. In the second place, the basis is to be the wealth of the family and not the wealth of the individual. In the third place, there is to be no differentiation as between various kinds of wealth. Fourth, the tax is to be levied on a progressive scale. Fifth, the payment may be spread over a number of years. Finally — and this is where the French scheme differs from that of the English (although its desirability is conceded by Professor Pigou)—the conscription of wealth is to be supplemented by the conscription of large unearned incomes which are to be capitalized before they are taxed.

M. Haristoy recalls to our mind the fact that similar projects were advanced in France after the Franco-Prussian war, but believes that the problem was at that time far less serious than at present. He recognizes that many difficult administrative problems are raised by the suggested levy on capital and he informs us that he has in preparation a large work dealing with the general question of the property tax. He calls attention in an appendix to the proposal introduced into the legislature by M. Métin for an annual progressive property tax. It is to be observed that neither the French nor the English writers take into account any possible indemnities from Germany as lightening the heavy burden of taxation.

No attempt is made in this review to estimate the validity of this argument or the applicability of the scheme to American conditions. An attempt to accomplish the latter object will be found in the report of the committee on war finance of the American Economic Association (to be presented at the meeting of the Association at the end of December) which will devote a separate section to the project of the capital levy.

Another point in which recent French discussion may be of possible interest to American readers is that of the excess profits and war profits tax. One of the clearest discussions of the principles underlying the war profits tax is to be found in the book by Léautey and Leseurre.[4] While this work is written from the point of view of the accountant, another work which also deserves attenton is written from the standpoint of the taxpayer. This is the book of Delahaye.[5] It is rather instructive to learn from the latter that whereas the American taxpayer has been saved from the injustice and rigors of the excess profits tax by the discretion of the administrative authorities, the reverse is true in France. The gravamen of the very vigorous complaints that are preferred by the authors is that the administrative authorities insisted upon excluding borrowed funds from the business capital upon which the excess profits tax was levied. The authors call attention to various somersaults made by the French administration in their interpretation of the law and lament that in the calamitous days through which France was passing, there was so little evidence of fiscal competence, tact, and conscience. The French taxpayer is evidently not afraid to voice his complaints even in times of crisis.

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[4] *La Taxation des Bénéfices de Guerre et l'Unification des Bilans.* L.-A. Léautey et Albert Leseurre. Paris, 1917, 210 pp.

[5] *La Contribution extraordinaire sur les Bénéfices de Guerre, Les Moyens et Petits Industriels et Commercants.* Delahaye-Bougère fils avec la collaboration de Charles Poisson et de Jules Delahaye. Paris, Georges Roustan, 1917, 111 pp.

TAXATION OF PUBLIC SERVICE CORPORATIONS IN THE STATE OF NEW YORK

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PART II

Difficulties with the Special Franchise Tax

The determination and assessment of the special franchise values have proved particularly difficult. The law as first passed left the assessment to the local assessors, but in its final form this was given over to the state board of tax commissioners. Senator Ford opposed the centralization of assessment, holding that under a rule which he suggested local assessors would have no difficulty in arriving at special franchise values.[20] The law prescribed no particular method of assessment, this being left to the decision of the tax commissioners. At their request the attorney-general appointed J. Newton Fiero as counsel to devise a plan for assessing special franchises.

The opinion given by Mr. Fiero is long and detailed, but an idea of the method he suggested can be gained from the conclusion to his report. He said:

> "The value of a 'special franchise,' therefore, is arrived at by ascertaining the value of the entire corporate property, taking into consideration all the elements which go to make up such value, and deducting therefrom the personal value of the corporation, or so much of the real estate as is not connected with the special franchise, and of the franchises not affected by this amendment; in fine, by deducting from the total value of corporate assets all the intangible and tangible property not part of, or connected with, the special franchise."

Mr. Fiero admitted the leeway this proposed method left to the tax commissioners, particularly in determining the value of good will, conduct of the business, franchise to be a corporation, and the value of the intangible property not taxable. It was impossible, he thought, to adopt rigid rules for the valuation of property the value of which depended on such a great variety of elements. Such rules could only be general in character and must be subject to modification in individual cases. Because of the wide discretion necessarily vested in the assessing officials absolute certainty in values could not be possible.

The tax commissioners had to contend at first with many difficulties and were severely criticized. Frequent inquiries were made as to how a particular special franchise value was determined, and the reply that it was impossible to use any one rule was naturally not deemed satisfactory. The board, in fact, found it next to impossible to perform the duties required of it. The task of placing a value upon every railroad and trolley crossing and every use of the streets and highways by public service corporations involved an enormous amount of labor. To give relief the legislature removed from the class of special franchises all uses of public thoroughfares less than 200 feet in length. Because of the discrimination which this necessarily occasioned the uses of public thoroughfares in cities or incorporated villages were later classified as special franchises, no matter how short.

In spite of the difficulties which they encountered, the tax commissioners approved the law. General approval, of course, attended the increased assessments and taxes which appeared. The corporations themselves, however, were not so well satisfied. The constitutionality was tested through the courts, the decisions always being in favor of the law.[21] A large number of cases involving methods of valuation have been before the courts, while various methods of determining value have been suggested. The court of appeals decided that

[20] The rule suggested by Senator Ford was practically the stock and bond method of valuation. The difference between the value and the reproduction costs would represent the value of the public and special franchises. He did not provide for separating these values. The rule would simply treat all intangible value as special franchise.

[21] *Metropolitan Street Railroad Company* v. *Tax Commissioners*, 174 N. Y. 417; 199 U. S. 1.

net earnings might in some cases be taken as the basis of value. Operating expenses and a reasonable return on the capital invested were to be deducted. The capitalized remainder was to be taken as the value of the special franchise. If, however, such calculations left no value for the special franchise, it would be conclusive reason for rejecting the net earnings rule and some other method of valuation should be adopted.[22]

It appears that in laying down this rule the court took no account of the fact that other intangible franchise values beside the special franchise must be considered. The total value of all franchises cannot properly be imputed to the so-called special franchise. The suggested rule at best gives merely the whole intangible franchise value and offers no way by which the assessment can be divided into sums representing the values of the different kinds of franchises. Neither does it give any way by which the value of one special franchise may be separated from the value of other special franchises. A railroad company, for example, may have special franchises in a number of tax districts and it is necessary to assign separate values to the franchises in each. Because of these elements which the rule did not touch as much uncertainty exists as before in making the assessment.

In a later case Justice Blackmar discounted the importance of net earnings in determining special franchise values. His contention was that the real value of a special franchise does not depend on what it *does* earn but upon what it can be made to earn. While he admitted the complications of such a plan, he thought it should be given due weight.[23] In an opinion which has just been handed down Justice Benedict commented on the special franchise as follows:

"A strong argument could be made to the effect that the special franchise of a railroad to maintain its line across a street is a species of property which is incapable of appraisement. It is obvious that there is no exact or certain method of valuing such a right apart from the rest of the right of way of the railroad, and that any valuation must therefore to a greater or less extent be arbitrary—in short, a matter of guess work. When we consider, in connection with this, the rule that such assessments are presumed to be correct and must be shown to be erroneous to be overthrown, it will readily be seen that the law affords great opportunity for injustice to the taxpayer, since however excessive a valuation might be it would be practically impossible to show that it was excessive unless it should be actually confiscatory."[24]

While the courts are thus quibbling over the application of the law, the assessments of special franchises continue to be made according to the judgment of the tax commissioners.

One obvious defect in the law as first administered was the failure to provide for the equalization of special franchise assessments with the assessment of other real property. The courts held that the tax commissioners had no power to give other than a full value assessment to a special franchise. Reductions in assessments could be made only by the courts. During the first eight years of the administration of the law less than one-half the taxes levied on special franchises were paid because the companies were awaiting the outcome of litigation. The tax commissioners, the court of appeals, the state conference on taxation, and finally Governor Dix appealed to the legislature to allow equalization of special franchise assessments with the assessments of other real property. This was accomplished by statute in 1911.[25]

The passage of the equalization amendment had a marked effect in reducing the amount of litigation. Nine hundred and seventy-five writs of *certiorari* were taken out in the courts in 1911 for the review of special franchise assessments. In the following year, with the amendment in force, the number fell to 212. In 1917 there were over 2,000 complaints and 350 *certiorari* proceedings, which would indicate that the operation of the law is not yet satisfactory. The equalization provision has caused litigation to be initiated by the tax districts. Cities and towns have begun action where they consider the commissioners have unduly reduced special franchise valuations. The equalization feature, moreover, has not removed inequality in assessment. It is an impossibility for the tax commissioners to determine just what is the ratio between the assessed and full value of real estate in the

[22] *Jamaica Water Supply Company* v. *Tax Commissioners*, 196 N. Y. 39.

[23] *Queens County Water Company v. Woodbury*, 67 Misc. 490.

[24] *People* v. *Tax Comrs., N. Y. L. Jour.*, May 10, 1918, p. 502. See also *People* v. *Tax Comrs.*, 171 N. Y. Supp. 784; *People* v. *same*, 199 N. Y. 162; *People* v. *same*, 199 N. Y. 167; *People* v. *same*, 69 Misc. 1.

[25] *New York statutes*, 1911, ch. 804.

various tax districts and to equalize special franchise assessments to this ratio.

New York City, because of the large number of special franchises found there, furnishes a good example of the working of the law. During the first seventeen years of its operation there were assessed against the New York City special franchises a little less than $110,500,000, while a little more than $74,500,000 was collected, or slightly over 65 per cent. This does not make allowance for the amounts paid to the city for various purposes nor for discounts and cancellations, which items amount to a little more than $30,000,000. There was a balance uncollected of more than $4,500,000. This does not mean, however, that final settlement has been made in all but this amount. Many payments have been made pending final adjustments by the courts. All unpaid taxes must bear an interest penalty of seven per cent and companies have paid taxes to avoid the penalty. They lose nothing by paying the tax since, when adjustments are made, six per cent interest is allowed on all refunds. Since many adjustments take years (some under advisement at present extend as far back as 1910), it can readily be seen why companies prefer to pay taxes pending settlement. The amount of taxes paid during this period still subject to review is nearly $16,000,000; which, added to the uncollected taxes, makes about $20,500,000, or approximately 19 per cent, still to be adjusted. The amount of unpaid taxes plus the amount paid pending settlement for the year 1917 was a little less than $4,500,000, which made the total levy still subject to review on August 15, 1917, a little less than $26,000,000. The total taxes which have been levied against special franchises, including the year 1917, has been nearly $120,000,000. This means that about 22 per cent of New York City special franchise taxes are yet to be finally adjusted—an indication, certainly, that the working of the law cannot be called satisfactory.[26]

As a whole, the statute has proved to be one of the most arbitrary and complicated parts of New York's already too complex system of taxation. The hope of the tax commissioners that the necessary equalization would raise other property assessments to full value has not been realized. The different methods and "rules" suggested for valuing the franchises and the admitted impossibility of framing a "rule" fitting all cases point to the conclusion that the fair and equitable assessment of special franchises is an impossibility. Questions such as the following must be considered: How shall the rate of capitalization vary, if at all, for companies operating under different degrees of hazard? What has been the character of the management in this or that particular case, and what allowance must be made for managerial ability in making assessments? How much of the earnings is to be attributed to property located outside the streets or highways? Are the amounts which some companies have paid to the city in lump sum to be taken into consideration? How can intangible values be separated from other franchises? What differences are to be made for varying length of franchises, *e. g.*, between a perpetual franchise and one by which the plant is to revert to the public without compensation, say in fifty years? What place should be given to the possibility of future earnings? Just how can the value to a railroad company of the right to cross a street in a country village of 1,000 population be determined?

Problems such as the above questions suggest and many others arise under the application of the law. When we consider that there are approximately 13,500 special franchises to be assessed annually and their values equalized with the assessed value of other real estate in the district where the franchise is situated, the impossibility of satisfactory results is evident. Instead of simplifying the tax system it has made it more complex. Revenue has been increased but at the expense of time and money in litigation and administration. Uniform and just treatment of corporations has not been secured, for it is virtually impossible to treat all alike.

Considerations for Improving Public Utility Taxation in New York

It is not our purpose to advocate any one kind of tax as *the* tax but to insist that a tax system should be such as to secure, as nearly as possible, justice among all classes of property and among the different divisions of each class where classification ex-

[26] The above statistics were taken from *The City Record*, December 22, 1917.

ists. In order to determine this it is necessary to know just the burden a tax places upon the payer. It is for this purpose that some unit system of taxation is desirable. It would be too much to hope for absolute justice among corporations or between corporate property and other property. But there is no reason why it should not be more nearly approximated than it is in the system of taxing public utilities in New York.

The substitution of an earnings tax or an ad valorem tax, notwithstanding the difficulties connected with each would without doubt prove more satisfactory than the present combination of franchise, earnings, and dividend taxes. This simplicity would bring intelligent publicity, with greater ease of obtaining justice among the public utility enterprises themselves and between the taxes assessed to such companies and those placed on other property. Checking up discrepancies which might exist would be much easier under a unit system than under the present one. It would make for uniformity and fairness; and where this has been accomplished litigation has decreased because corporation officials have been willing to co-operate with taxing officials to secure efficient enforcement of the law.

The gross earnings tax has a number of ardent supporters and, as we have already seen, a number of states use it. The big factor in its favor is the ease of administration. From the standpoint of equality and justice it meets with some difficulties even though classification is often used. Gross receipts do not necessarily represent earning capacity and it is this feature that makes a concern valuable and able to pay taxes. It is what is left after expenses are paid that spells success or failure. The gross earnings of two street railroad companies, for example, might be the same while the net returns might be such as to make one a success and the other a failure. The one might be working under auspicious circumstances — short lines, level streets, heavy traffic, etc., while the other might have opposite conditions. The net earnings basis has been suggested and tried but the administrative difficulties make it impracticable. Administrative difficulties have also arisen in attempting to use the initial and reproduction costs as bases for taxes.

The ad valorem tax has been condemned because it savors of the general property tax. This has been due largely to a misunderstanding of the modern significance of the term and to some discrepancies which have arisen. These have arisen because of the inability of assessors, their lack of power, or because too few factors have been considered in arriving at valuations. The modern interpretation of an ad valorem tax, however, has come to mean a tax placed upon the value of a public utility as a piece of property rather than dividing up into different elements. It further implies a more or less expert valuation of the property by some centralized state board which is left free to consider all the elements that contribute to the value. The Virginia joint tax commission characterized the method as follows: "We believe that under an ad valorem system, administered by a competent board, untrammeled by any single standard or rule, it is easier to establish justice in taxation than under any other method." [27]

It is easy to see the importance of these two considerations—competency and broad powers of the assessing board. It would be considered absurd to send a man or group of men who had spent their lives as sailors to value a carriage. It would be just as absurd to instruct men, no matter how competent, to arrive at the value of a carriage by considering only the wheels, or bed, or pole, or top. A particular carriage might have no top, or shafts in place of a pole, or the wheels might be newly painted; so that no one of these could be taken as the controlling factor in its value. The men should also be allowed to examine the spindles to see how much they were worn—in short, to take into consideration all parts which might have an effect on value. In assessing a public utility a competent board must likewise have broad powers. It must be permitted to consider all factors which may contribute to value: franchise, original cost, reproduction cost, earnings, etc. Not only must it be given power to consider all these items, but it must be given access to them. In order to carry on its work efficiently, the company's books, accounts, and records should be at the disposal of the assessing board. It should be given power to examine witnesses and require reports; be given every possible privilege which will enable it to make a proper valuation. When

[27] *Report of the Joint Committee on Tax Revision, Virginia*, 1914, p. 138.

this combination exists, a competent board with extensive powers, the prevalent objections to the ad valorem basis are greatly minimized.

Under the present status of public service corporations there does not exist such a wide discrepancy between a tax on earnings and a tax on value as the champions of each system would sometimes have us believe. Where the charges for the services are not regulated there can be no definite relation between the value of the property in use and its earnings. The public utilities, however, are under the control of two public service commissions whose business it is to see that the earnings shall represent but a fair return on the value of the enterprise. Of course, there is no absolute rule for determining the value upon which earnings shall be allowed and it is impossible to determine value so exactly or to fix rates so accurately in each case that a fair return will just be realized. The more nearly this is approximated, however, the more nearly will a tax on earnings correspond to one on value. In a case of perfect valuation and regulation of charges, where 10 per cent was allowed as a fair return, it could make little difference whether the tax were 10 per cent of the net earnings or one per cent of the valuation. Because of the indefinite relation between net and gross earnings this close approximation could not exist between a gross earnings and an ad valorem tax, yet they would correspond more nearly than under a system of no regulation.

The adoption of a unit system of taxation would open the way for securing reform in the local taxation of public utilities with but little added burden or expense. The entire abolition of local assessments might be secured if the localities could be made to see that by such a change they would not be the losers and if the legislature could be made to see that greater equality would be secured thereby. Some states have already recognized the advisability of having all assessments made by central authorities where the plants extend into more than one taxing district. With the central board and machinery already in existence and making valuations the addition of taxes for local purposes could be made very easily and the proceeds distributed to the districts. Difficulty might arise in choosing a basis for this distribution. Possibilities would be the length of trackage, lines, or mains, the amount of business arising within the district, or the amount of property found there. The first appears the most equitable since the others involve the valuation of parts of a business and open the way for inequalities. Where business is greatest, moreover, tracks, etc., are duplicated so that business is reflected in the amount of trackage.

A tax on public utilities assumes a different aspect from what it formerly had. The public service commissions are expected to secure justice between the utility and the public as to rates, service, etc., which deprives the tax of its regulatory aspects and leaves it only as a fiscal measure. To continue to tax to regulate would reflect on the ability of these commissions to accomplish their purpose. If their purpose is accomplished, no such value as the special franchise, for example, would appear. Under regulation, then, the question of taxation resolves itself into this: Are public service corporations to be regarded as existing for the benefit of the users, the community viewed as a body of taxpayers, or both? If regarded as existing for the former, then the rates will be low and there will be nothing left (over a fair return) for taxes; if for the community of taxpayers, then high rates will be charged for service with some curtailment in use; if for both, moderate rates will exist with a moderate surplus for taxes.

When a public utility pays a tax under a system of regulation it merely acts as a collector of that tax from the user of the utility. The net earnings must be large enough to allow a fair return. In ascertaining net earnings taxes are one of the items to be deducted from gross receipts. If taxes were abolished the total income of a company would be reduced by the amount of the taxes and the net earnings remain the same. Because taxes thus increase the burden of the consumer, some have advocated the abolition of taxes on public utilities while others would make them comparatively light. Such taxes are, of course, class taxes—taxes upon that class using the utility. The abolition of the tax would mean a larger tax to be paid by the owners of other property, still a class tax. The most logical and just way, it would seem, would be to tax public utility property to the same extent that other property is taxed

and in such a way as to equalize the burden on this property and other property.

The above discussion leads to the conclusion that the system of taxing public service corporations in New York is far too complex and that there is no way of comparing tax burdens on different classes of property. The laws of no other state compare in complexity. The addition of the special franchise tax has no justification, its attempted administration has filled the courts with litigation and has failed to bring justice and satisfaction. From the difficulties experienced under the present system, it would seem advisable to follow the example of some other states and adopt some unit method of taxation, either the earnings or the ad valorem basis. If this were done it would be comparatively easy to extend the system to mitigate the present outstanding inequalities and injustices of local assessments. Finally, this class of property should be taxed at about the same rate as other property, unless it be desired that the users of public utilities should bear especially heavy or light tax burdens.

NOTES AND NEWS ITEMS

THE GEORGIA SPECIAL TAX COMMISSION

The legislature of Georgia in August, 1918, made provision in its revenue measure for a special tax commission of eight, three to be appointed by the governor, three by the speaker of the House and two by the president of the Senate. The commission is to investigate the present tax system of the state, hold meetings in different sections of the state, at which citizens may discuss with the committee any phase of the taxation question as it affects the interests of any section of the state or any class of its people, and "to make a report embodying conclusions and recommendations."

Ten thousand copies of the commission's abridged report, expressed in clear and non-technical language, shall be distributed through the state. The committee shall submit to the next general assembly a comprehensive revenue bill.

The commission consists of the governor, M. Dorsey; Tax Commissioner J. C. Hart; Senators H. R. DeFarnette and R. A. Dewey; Representatives Seaborn Wright, L. R. Akin and Z. Arnold; and the three citizens appointed by the governor, Enoch Callaway, Toombs DuBose, and Edgar H. Johnson.

Professor Johnson, one of the members of the commission, writes the editor: "Let me add my own personal belief that the meeting of the National Tax Association in Atlanta last fall is, in part at least, if not wholly, responsible for this special tax commission, the first, so far as I know, in the history of the state. Four of the above commissioners were delegates to the Atlanta meeting." The commission is making good use of their series of *Proceedings* of our annual conferences.

1918 VALUATIONS BY THE ARIZONA COMMISSION

The total valuation for the state, including private car lines, fixed by the state tax commission sitting as the State Board of Equalization, was $835,916,000. The valuation for 1917 was $669,245,000, making an increase for 1918 of $136,672,000, or 19.58 per cent. The state rate was reduced from 53.5 cents on each $100 valuation in 1917 to 39 cents this year. This was a reduction of 14.5 cents or 27 per cent. About $90,000,000 of the increase in valuation was made on mining property, a material part of this being due to new properties coming into being.

The Inspiration mine was valued at $79,000,000 in 1917. The lower court reduced this valuation $18,000,000. The case is on appeal before the supreme court of the state. This year the commission valued the Inspiration at $82,000,000. The company has filed suit for a reduction.

In 1917 the commission assessed all custom smelters by capitalizing their net earnings at 15 per cent. The International Smelter at Miami on this basis was assessed at $4,500,000. The valuation was fully $2,500,000 over its physical value. The company made over $2,000,000 profits. This valuation was reduced by the court to $2,000,000. The case is on appeal. This

year the commission raised its valuation of last year to $4,900,000 and the company has not appealed from the assessment.

This year the commission assessed produce merchants, meat merchants, banks, flour mills, moving picture shows, custom smelters, and oil companies by capitalizing their net earnings. Of the oil companies, the Standard Oil Company received the largest increase. Its physical property in the state was valued by the local assessors at $342,000. The commission found the net earnings of the company to be $727,649 after allowing federal taxes for $223,729. The net earnings for the one year were capitalized at 25 per cent which found a valuation of $2,910,597. The company has brought suit in the federal court, first asking that the tax collectors of the state be enjoined from putting their property on the back tax rolls pending the adjudication of the matter; and second, asking that all the valuation over the $342,000 be taken off because their property has no intangible value, and if it did have such value, the same would be due to earnings made in California where the oil that is sold in Arizona was produced and refined. The company admits a profit on its production and refining in California which the commission did not take. The injunction was denied and the plea is appealed to San Francisco, to be heard the 29th of November.

C. M. Zander.
Chairman Arizona Tax Commission.

WE ARE PROUD OF HIM

The following is from the speech of Hon. Claude Kitchin, Chairman of the Ways and Means Committee, in the House of Representatives, September 6, 1918, when reporting the revenue bill:

"Our committee wishes to acknowledge its indebtedness to the diligent labor, the splendid counsel, the wise suggestions of Dr. Thomas S. Adams, Chairman of the Excess Profits Advisory Board, a distinguished thinker and student of economics and taxation."

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Income Tax—Dividends Received by Partnerships.—The taxable status under the 1913 income tax law, of dividends received by a partnership, has recently been passed upon, it being held that a member of a partnership is not required to include such dividends in his individual return of income derived from the profits of the partnership in computing his normal tax. The claim of the government was that the receipt by the intermediary—the partnership—of dividends, destroyed their character as such in the hands of the individual member who should be held under section D for a tax upon his share of the entire partnership profits however derived. The court rejected this contention, holding that reading the entire act, it was plain that the partnership was to be ignored for tax purposes and the individual dealt with as the taxable unit. Point was made of the fact that the 1916 law specifically provided that individual members should have credit for their share of dividends, which was urged in support of the claim that the 1913 law should be construed otherwise, but the court held that the change was made to clear the question and set at rest the present controversy.—*United States* v. *Coulby*, 251 Fed. 982.

Income Tax — Income Accrued — "False" Returns.—The taxation of income in the year when received although "earned" in a prior year—in this instance, before the effective date of the law—has been held authorized by the broad provisions of sec. 2, par. A, subd. 1, and par. B of the act of 1913. The income in question was commissions on renewal premiums paid on insurance policies derived by the agent under contracts executed prior to 1913. It was held that this was clearly embraced in the definition of income; that while the right to the commissions came into being in prior years, this right was contingent and remained contingent until actually turned into money. The decision in *Edwards* v. *Keith* (231 Fed. 110; 243 U. S. 638) is followed, and *Lynch* v.

Hornby (247 U. S. 339) and *Hays* v. *Gauley &c. Co.* (247 U. S. 189) are cited as authority for the doctrine that "everything that became income in the ordinary sense of the term, after the adoption of the amendment" could be lawfully taxed.

Another point in the case arose from the circumstance that it was admitted that the return was incorrect as not including the commissions, although not "fraudulent." The government's position was that it was "false" within the meaning of paragraph E of the act, and therefore the making of an additional assessment within three years after the due date of the original return was authorized. This contention was sustained, following *Bank* v. *Gill*, 218 Fed. 600, and *Bank* v. *Allen*, 223 Fed. 472, and the additional assessment was held lawfully made.—*Woods* v. *Lewellyn*, 252 Fed. 106. (See also BULLETIN, III, 246; IV, 27.)

INCOME TAXES — DEDUCTION FOR DEPRECIATION. — Definite recognition of the propriety of a deduction from gross income of a sum representing loss from depreciation, in addition to expense of "ordinary and necessary repairs" is given in a recent case. A steamship company included in its deductions as expenses of maintenance and operation, sums paid out for repairs to its steamers and also a sum equal to 5 per cent of their book value to represent depreciation. The department admitted that this latter deduction was reasonable, but contended that the expense of repairs was covered thereby and could not be claimed as an expense. The court refers to the matter as not having been before decided although involved in the case of *Grand Rapids & Ind. Ry.* v. *Doyle*, 245 Fed. 792. It clearly defines the distinction between depreciation and ordinary repairs, and holds the former to represent the "lessening value due to wear and tear, decay or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property in spite of ordinary current repairs." — *San Francisco & Portland S. S. Co.* v. *Scott*, U. S. Dist. Ct., reported in T. D. 2773, Nov. 8, 1918.

INCOME TAX — SITUS OF INCOME — JURISDICTION.—In construing the state income tax law as applied to income derived by residents through non-resident trustees, the Massachusetts court has discussed in a helpful way the questions of *situs* and jurisdiction which are being pressed anew upon the courts in connection with income taxation. In this case the "due process" clause was urged to prevent the taxation of income of a resident from securities held by a non-resident trustee, the securities not being taxed to the trustee by the foreign state. The court disposed of this contention, and in doing so took occasion to refer to and discuss some earlier decisions which have been considered as settling *situs* questions with respect to intangible property but which now seem applicable to income taxation.

In the course of the opinion the following characterization of income taxation appears and is reproduced here as a helpful reminder and also as evidence that our courts are not so altogether lacking in their grasp of modern tax questions as some of our theoreticians would have us believe:

> "The income tax is measured by reference to the riches of the person taxed, actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom, and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. . . . Our income tax law is founded upon interstate comity in this regard. It taxes only residents of this commonwealth in respect of property in which they have a beneficial interest. It exempts resident trustees, although manifestly within the legal scope of its power, from taxation upon funds for the benefit of non-resident *cestuis que trust*. But it taxes resident *cestuis que trust* in respect of income actually received by them from trusts held in other states and not there taxed. This principle of taxation, just in itself and based upon recognition of like rights in sister states and manifestly aimed at the elimination of duplicate taxation upon the same property in different states, does not seem to us to violate any guaranty of the Fourteenth Amendment to the federal Constitution."

The cases of *Hawley* v. *Malden*, 232 U. S. 1, and *Fidelity &c. Co.* v. *Louisville*, 245 U. S. 54, 58, are cited as of direct

bearing. — *Maguire v. Tax Commissioner*, 120 N. E. 162.

INCOME TAX—NOTES ON CURRENT LITIGATION.—The following notes of proceedings in the United States supreme court in income tax cases, are of general interest: Writs of *certiorari* have been denied in *Altheimer & Rawlins Inv. Co.* v. *Allen*, 248 Fed. 688 (U. S. Sup. Ct., Nov. 11, 1918); *Brady* v. *Anderson*, 240 Fed. 665 (244 U. S. 654); *West End St. Ry. Co.* v. *Malley*, 246 Fed. 625 (246 U. S. 671); *Grand Rapids & Ind. Ry. Co.* v. *Doyle*, 245 Fed. 792 (234 U. S. 762); *Renss. & Sar. R. Co.* v. *Irwin*, 249 Fed. 726 (246 U. S. 671), and *Edwards* v. *Keith*, 231 Fed. 110 (243 U. S. 638). Petition for writ in *Crocker* v. *Malley* has been granted. In the case of *Camp Bird Ltd.* v. *Howbert*, 249 Fed. 27, the judgment was reversed on confession of error by the United States (247 U. S. 509). The case of *Lewellyn* v. *Gulf Oil Corp.*, 245 Fed. 1, was reversed December 9, 1918. The case of *Nipissing Mines Co.* v. *U. S.*, 206 Fed. 431, was dismissed on motion of the United States (234 U. S. 765). The cases of *De Ganay* v. *Lederer; U. S. v. Md. Casualty Co.; Skinner* v. *U. Pac. Coal Co.; Shaffer* v. *Howard*, and *Moon Co.* v. *Wisc. Tax. Com.* are on the docket.

Comment on most of these cases may be found by referring to the classified table of cases distributed with the June BULLETIN. It may here be noted that, by error, the citations in that table to certain of the income tax cases were given as 246 U. S. instead of 247 U. S.

STATE INCOME TAX—FOLLOWING FEDERAL FORM—"NET INCOME." — The advantage of co-operation between federal and state officials in the administration of income tax laws has been already recognized by four states.

The act of West Virginia, imposing a special excise tax upon the net income of corporations (secs. 5-16 of ch. 3, acts 1915, 2nd ext. sess.), provides that the corporation may, at its option, file a duplicate of its return made for the same period to the federal government, but as the acts specifically refer to a report made under the provisions of the federal act of October 3, 1913, which has since been amended in various particulars, this option is no longer practically available and reports are required in accordance with the provisions of the state law which follow largely the provisions of the 1913 federal law. Incidentally this illustrates the disadvantage of the requirement for filing copies because of the changes in the federal statute and in the rulings under it caused by the decisions of federal courts.

Connecticut was the next state to avail itself of federal assistance. In the law for the taxation of miscellaneous corporations on the basis of net income (L. 1915, ch. 292), it was provided that the net income so taxed was the "net income . . . upon which income such company is required to pay a tax to the United States," and the companies were required to file a copy of their last annual returns made to the United States together with other facts necessary to make the required apportionment to the state.

The New York law taxing the net income of manufacturing companies (L. 1917, ch. 726) also makes use of the fed eral forms. By sec. 209 of that law a tax was imposed "to be computed . . . upon the basis of its net income . . . upon which income such corporation is required to pay a tax to the United States." The force of this section has been weakened if not destroyed altogether by the amendment of 1918 (L. 1918, ch. 276) by which the income upon which the state tax is laid is only "presumably" the same as that upon which the federal tax is paid. The results of this change are likely to be far-reaching, it being now, we understand, the custom for the corporations to prepare their returns without regard to the limitations of the federal law and, as there is little likelihood of state audit, the resulting situation would appear to be most uncertain and unsatisfactory.

The Massachusetts law taxing the net income of certain domestic corporations (L. 1918, ch. 255) provides that such a corporation shall pay a tax "computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States."

The purpose of these various provisions was obviously to render less difficult the administration of the law and to greatly decrease the expense without loss of effi-

ciency, it being evident that it would be an unnecessary duplication for the states to check the thousands of returns. In addition, the irritation of a second set of examinations is to be avoided if possible.

The Massachusetts law was enacted in May, 1918, and hence after the passage of the federal act of October 3, 1917. This latter act, in connection with previous federal acts, provides for three sorts of taxes upon income or profits, namely, the tax under the act of September 8, 1916, and the war income and the war excess profits taxes levied under the act of October 3, 1917. The "total net income" as defined in the act of 1916 was made the basis of the taxes under the act of 1917.

The Massachusetts act under consideration provides that the corporation shall render a copy of its last return made to the collector of internal revenue of the "annual net income . . . and . . . such other information as may be requested by the United States Treasury Department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of such corporation after making the deductions authorized."

The federal law of 1916 provided that corporations should pay a tax upon their total net income, but the law of 1917 provided that corporations subject to the war excess profits tax should have a credit for such tax against their net income. Thus such corporations were not required to pay a tax upon their "total net income."

In this situation the question arose under the Massachusetts law as to whether, in computing the tax under that law, the total net income should be used or the net income upon which a tax was paid to the United States, namely, the total net income less the war excess profits tax, in the case of corporations subject to the latter tax. The Massachusetts supreme court has just announced its decision, holding without much difficulty that the act clearly permits the deduction and provides that the tax shall be levied upon the same basis as is used in computing the federal income tax of the corporation in question.

It was contended on behalf of the commonwealth that the only net income described in any of the acts of Congress is that ascertained in accordance with the act of 1916, and hence that that net income was taxable under the Massachusetts act, although none of the corporations, parties to the suit in question, had actually paid a tax upon that exact sum. This contention was declared untenable as being contrary to the express words of the section which subjected to tax only that portion of the net income upon which the "corporation is required to pay a tax to the United States"; and it was stated that, if the purpose had been to adopt a measure of taxation in accordance with that contention, apt words to express that purpose would have been used. The court concludes with the statement that "the meaning of the operative words of the statute is plain. The purpose of the act is unequivocal. Its effect is to subject to the income tax there to be assessed only that portion of the net income of a corporation within its terms upon which the United States under its laws actually requires a tax to be paid to it."—*American Printing Company et al.* v. *Commonwealth*, 120 N. E. 686.

Corporation Franchise Tax. — Another puzzle has been presented by the United States supreme court by its action in dismissing the appeal on writ of error, in the case of *Louisville & Nashville R. R. Co.* v. *Alabama*, 78 So. 93, noted in Bulletin, vol. 3, p. 206. The court merely notes the dismissal "for want of jurisdiction" on the authority of *St. L. S. W. R. R. Co.* v. *Arkansas*, 235 U. S. 350, and *K. C. M. & B. R. Co.* v. *Stiles*, 242 U. S. 111.

We were prepared to explain the *Southwestern* case upon the theory that the court really dealt there with a property tax on the franchise *as property*, arising from the privilege of doing business in the state by a foreign corporation. We could thus justify the reference to the entire capital as a measure of the value of this *property*. And this view was strengthened by the observations of the court in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, where in stating the propositions to be deemed "established," Justice Pitney includes one that "the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. *See also, St. Louis S. W. Railway v. Arkansas, 235 U. S. 350, 365.*" The

page to which he refers specifically deals with the franchise as *property*. But this Alabama tax seems to us to be a definite privilege or license tax and to be so construed by the state court. Thus our difficulty with the *Arkansas* case again arises.— U. S. Supreme Court, November 4, 1918.

Bank Taxation. — A decision of far-reaching consequences has just been announced. The question at issue was whether in taxing a bank under the Iowa law (34th Gen. Assem., ch. 63—1911) liberty bonds could be included. The act in question provided that the shares of stock of the bank should "be assessed to the individual stockholders," this change being made as the result of the decision in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. Prior to this, the statute had provided that the shares should be "assessed *to the bank* in the city or town where located and not to the individual stockholders." Under this statute the Iowa courts had for many years upheld assessments upon values which included government bonds, but the decision referred to held the inclusion of such bonds in excess of the power of the state.

In the instant case the court fully recognizes the authority of *Van Allen* v. *Assessors*, 70 U. S. 573, and of the many decisions based thereon, which have upheld assessments nominally made upon the shares but which have been valued by the inclusion of assets consisting of United States bonds, upon the doctrine, established in that case, of the existence of the shares and of the property of the bank, as separate subjects of taxation. It also carefully admits the importance of the decisions of the Iowa courts in construing this same law and holding an opposite view in similar cases (*Head et al.* v. *Board of Review*, 152 N. W. 600; *First Nat. Bk.* v. *Council Bluffs*, 161 N. W. 706).

The conclusion of the court is based upon the specific and recent *statutory* exemption of liberty bonds from taxation, a circumstance not present in the cases in the state courts referred to, and also mainly, it would seem, upon the view that the change in the Iowa statute made in 1911 was merely nominal and that what has in fact been done under it, is precisely what was done before, thus justifying the criticism that the state was seeking to do indirectly what it could not do directly.

If this decision is affirmed very many state laws providing for the taxation of bank shares by reference to capital stock surplus and undivided profits, without deduction of exempt securities, will be seriously affected. The consequences of allowing deductions of exempt property from net worth are apt to seriously impair the vigor of a taxing law, when the possibility is recognized of securing the exempt property through borrowed money, thus providing a double deduction. — *Iowa Loan & Trust Co.* v. *Fairweather*, 252 Fed. 605. (See Bulletin, III, 148, 179, 210, 246.)

Inheritance Taxes — Deduction of Federal Estates Tax.—The New Jersey court has recently passed upon this question which is of importance to all states and has held that the federal tax is deductible. The opinion is of interest as it discusses the theories of transfer taxation, the relations of the states and the federal government in the matter, and the conflicting views of the state courts.

The federal tax is held to be a tax imposed "upon the estate transferred by death and not upon the succession resulting from death." The New Jersey law (P. L. 1909, p. 323) is held to impose a tax "not on the transitory succession of the executor or administrator, but upon the separate successions of the transferees" . . . "not upon the aggregate value of the estate transferred" . . . "but upon the value of the several interests." Upon this view it is held to be apparent that the clear market value of the property transferred from the dead to the living is the value of the estate after all charges against it, including taxes, are satisfied.

It is recognized that the federal act results in a financial loss to the state, but it is held that this does not arise from an "assumed supremacy in the United States" nor is the exercise of the taxing power by the national government an "interference with state rights, as some judges have intimated." It is pointed out that the two laws function differently, and that it is entirely possible for the states to enact laws which will reach the entire estate and thus be coextensive with the federal act and coexistent with the tax on the individual succession.

Interesting reference is made to the conflicting views of the Minnesota court (*State*

v. *Probate Court*, 166 N. W. 125) and the New York court (*Sherman Estate*, 166 N. Y. Supp. 19; 118 N. E. 1078) on this question, and criticism is made of the holding of the latter court. The Connecticut decision, *Corbin* v. *Townshend*, 103 Atl. 647, is noted, where the deduction was allowed.—*In re Roebling's Estate*, 104 Alt. 295.

The decision of the Orphans' Court of Phila. County in *Knight's Estate* (Bulletin, III, 213), holding that the federal estate tax may be deducted before applying the state transfer tax rates, has been affirmed by the supreme court of Pennsylvania. The court notes its accord with the Massachusetts court (*Hooper* v. *Shaw*, 176 Mass. 190) and its variance from the New York court (*Re Bierstadt*, 166 N. Y. Supp. 168). It also refers to the rulings of the lower courts in harmony with its own.—*In re Knight's Estate*, 104 Alt. 765.

Uniformity—Equality.—In an opinion involving many other points of local application, there occur some interesting observations upon the general matter of equality in assessments based upon the claim by the taxpayer for relief under the authority of the recent Kentucky franchise cases (244 U. S. 499). It is here again announced that the undervaluation of other property must be a systematic intentional discrimination against the complainant to avail him.

This principle is carried further and it is held that, where all property is undervalued, correction of such assessments cannot be condemned as not having extended to all properties, where no intentional or systematic discrimination in making the *correction* is shown. *State* v. *Hall*, 54 So. 563, and *Bank* v. *Supervisors*, 72 So. 697, are cited as sustaining the propositions that "equal protection of the law" cannot mean "equal immunity in its violation or evasion," and that because a law has been generally unenforced and the assessments have customarily been made at less than fair value, the courts or other agencies are powerless to correct any one assessment until and unless all are corrected, as such a position would allow violators of the law to repeal the law, and beget a constitutional right in every evader to plead immunity except upon condition that no other evader be allowed to escape its requirements and put an end of all government laws.—*Union Tanning Co.* v. *Commonwealth*, 96 S. E. 780, 788.

Machinery and Equipment as Personal Property.—The first decision coming to our notice construing the scope of the exemption of machinery contained in the recently enacted net income tax law of New York taxing manufacturing and mercantile companies has just been rendered. This law (Laws of 1917, chap. 726, amended by laws of 1918, chaps. 271, 276, 292 and 417) provides that such companies shall "not be assessed on any personal property which for the purpose of this exemption shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises, if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting."

Prior to this law machinery installed in a building was held taxable as real estate (*N. Y. Edison Co.* v. *Wells*, 135 App. Div., 644). It was conceded in the case that the assessment in dispute covered machinery which could be detached without material injury to the building. The court held the language in nowise "uncertain or doubtful of meaning" and that the "plain intent" was to exempt the property in question from taxation, and ordered the assessment reduced accordingly.—*People ex rel. General Chemical Co.* v. *Cantor et al.*, N. Y. Law Journal, Nov. 19, 1918, p. 578.

Manufacturing. — In construing the recent Kentucky statute (sec. 4, ch. 11, Acts 1917, spec. session) providing exemption from local taxation for machinery and manufactures, the court had occasion to discuss generally the definition of "manufacturing." It was held that the curing of tobacco was not "manufacturing."—*American Tobacco Co.* v. *Bowling Green*, 205 S. W. 570.

Payment of Taxes by Mistake. — A person who pays taxes on property of another on the erroneous belief that he is paying on his own property, such belief

being induced by the action of the tax collector in sending an incorrect bill, will not authorize the subrogation of the taxpayer to the rights of the city so as to enable him to enforce a lien which the city might have against the property. — *Jacobs* v. *Webster*, 205 S. W. 530.

Situs. — Personal property, in order to have a situs for taxation in a locality different from the domicile of its owner, must be permanently located at the place where it is sought to be taxed.—*Semple* v. *Commonwealth*, 205 S. W. 789.

Situs — Bank Deposits. — In a recent Ohio case it was urged that bank deposits should be regarded as tangible property for taxation purposes and that such deposits in a bank in another state were not taxable to an Ohio corporation. In support of this claim, section 5326 of the general code, defining "money" as including a deposit in a bank, was referred to. The court readily disposed of this contention, holding in line with the well-established principle that a bank deposit creates the relation of debtor and creditor; and that the credit is taxable at the domicile of the creditor. The case of *Fidelity &c. Co.* v. *Louisville*, 245 U. S. 54, is cited as covering a similar question. — *Cleveland &c. Coal Co.* v. *O'Brien*, 120 N. E. 214.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

Arbuthnot, C. C. This generation cannot escape paying the cost of war. Reprinted from *The Scientific Monthly*, November, 1918.

"The outstanding conclusion in this consideration of some of the principles of war finance is that the costs of war in men, material, and money are present costs that cannot be saddled on the future."

Bankers Trust Company. The taxation of personal property, State of New York. 1918. 20 p.

Published for the guidance of individual taxpayers, trustees, executors, administrators, and corporations.

Bankers Trust Company. Ownership certificates and information at the source. 1918. 36 p.

Barth, Carl G. The income tax. An engineer's analysis with suggestions. Revised reprint from June and July, 1918, issues of *The Journal of The Engineers' Club of Philadelphia and Affiliated Societies.*

"The absolute lack of mathematical regularity in the increases at which incomes are taxed, under the law of 1917, as well as the similar lack of regularity in the tax rates themselves," led to the development of a formula, presented in this paper, whereby the inequalities and inconsistencies of the existing income tax law may be avoided. The discussion of the formula is supplemented by a number of tables and charts with a view to setting forth more clearly the advantages of continuuous grading of the tax over the principle of intermittent stages. By introducing appropriate variations in the value of one constant, the formula is equally applicable to single men or to married men with or without children; and by combining it with Pareto's law a formula is obtained which will give the total of all taxpayers who receive incomes between a maximum and a minimum. For the practical application of such a method, it is recognized, reliable statistics of the distribution of incomes, and the total national income, must be available.

Connecticut. Information relative to the assessment and collection of taxes. 1918. Published by the Tax Commissioner, July, 1918. 48 p. tables.

First National Bank of Cleveland. The use of ownership certificates and other information of interest to bankers and investors. Cleveland. 1918. 24 p.

Illinois. State Board of Equalization. Report of the session of 1917. Springfield. 1918. 225 p.

Greater activity was displayed in dealing with the assessments of real property, but the assessment of personal property was left unchanged in every county. Some salutary changes in committee membership reveal the influence of a progressive minority on the Board. An effort was made to remove the one per cent limitation upon the

increase in the state duplicate, by the application of a subsequent section of the act of 1898, wherein the Board is empowered to raise the assessment in any or all counties by ten per cent. The attorney general refused to sustain the argument of repeal by implication.

Philadelphia Bureau of Municipal Research. Citizens' Business, nos. 325-340. August–November, 1918.

These little leaflets come along regularly. They are always short, snappy, and to the point. We appreciate them, even though we are not able to print a separate notice of each one.

United States. Bureau of the Census. Financial statistics of cities having a population of over 30,000. 1917. Washington, 1918. 373 p. tables.

United States. Bureau of the Census. Financial statistics of states. Washington, 1918. 129 p. tables.

Washington. Minutes and official proceedings of the state board of equalization, session of 1918. Olympia, 1918. 79 p. tables.

Washington. First biennial report of the state tax commissioner for the period ending September 30, 1918. Olympia, 1918. 114 p. tables.

Woodworth, Leo Day. The effort to abolish land ownership. *National Real Estate Journal*, April 1918, pp. 188-190.

The first of a series of articles on land ownership and taxation to appear in the *National Real Estate Journal*, this one being devoted to a statement of the case for nationalization as shown in the writings of its proponents.

THE NATIONAL TAX ASSOCIATION

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

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HOW ABOUT YOUR DUES?

The treasurer tells us that there are some members of the Association whose dues are in arrears. We had supposed that, under the efficient training of the commissioner of internal revenue, every citizen of the United States had by this time acquired the habit of paying up promptly. We are not able to threaten fine or imprisonment or other dire penalties, but we do earnestly exhort you not to add to the already heavy burdens of your officers by forgetting your obligation to the National Tax Association treasury.

CONFERENCE AND PROCEEDINGS

In the time since the December BULLETIN went to press the officers and executive committee of the National Tax Association have been busily engaged in canvassing the whole situation with regard to the postponed 1918 conference. It has finally been decided that it is out of the question to try to hold a conference this winter. The legislatures of many of the important states assemble in January, which makes it impossible for the members of several tax commissions to be away from their offices for the next few months. It appeared certain that a conference held in January or February would be attended by only a small number and would be lacking in interest. If, on the other hand, the conference should be held in the spring, it would be already too late to take the place of the 1918 conference. The papers and addresses prepared originally to be delivered in November would by that time have generally become out of date, and the valuable work done on them would to a considerable extent be lost.

Although the conference is to be abandoned, the 1918 volume of PROCEEDINGS will be published. The secretary will collect the contributions which were to have been given and as quickly as possible publish a volume to serve as the PROCEEDINGS for 1918. Obviously this will be a smaller publication than our regular annual PROCEEDINGS since it will lack the discussions which are so important a part of the annual conference. However, this is the best we can do under the circumstances, and it will give to the public the valuable papers which have been already prepared and will also keep up the continuity of our PROCEEDINGS.

DOMINION AND PROVINCIAL REVENUES

ARCH. B. CLARK

Professor of Political Economy, University of Manitoba

[Reprinted from the Manitoba *Free Press* of December 5, 1918]

At the recent interprovincial conference at Ottawa, Sir Thomas White, it is reported, raised the question of the overlapping of taxation, and indicated a desire for some better division of the field between the dominion and the provinces. As a means to this end he suggested, for the consideration of the conference, that to the dominion government might be conceded the exclusive privilege of levying an income tax, while that government in return might agree to adopt a self-denying ordinance as regards land taxation and licenses, leaving these sources of revenue entirely at the disposal of the provinces.

The problem is one the solution of which cannot fail to have a powerful influence on the future development not only of federal but still more of provincial and municipal finance in Canada. That the respective spheres of the different taxing bodies should as far as possible be kept distinct is a general principle that will command wide support. The finance minister's concrete proposal, however, is quite another matter.

No intelligible discussion of the subject is possible without reference to the terms of the British North America act of 1867; for that enactment is the corner stone of our fiscal system. One of the ostensible objects of confederation was the establishment of a uniform customs tariff, and the statute accordingly reserves for the dominion parliament the exclusive right of levying and collecting customs and excise duties. But further, the right of taxation is an attribute of sovereignty, and it was certainly no part of the intention of those who framed the British North America act to limit in this respect the sovereign power delegated to the dominion parliament. It is accordingly authorized to raise money "by any mode or system of taxation." The provincial legislatures, on the other hand, being thus deprived of the customs and excise duties which had been the financial mainstay of the pre-confederation colonies, are by way of compensation given certain direct grants from the federal exchequer, together known as the "dominion subsidy"; and, in addition, are given exclusive authority in certain branches of taxation, namely:

(a) "Direct taxation within the province in order to the raising of a revenue for provincial purposes.

(b) "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

It is thus clear that, while the provincial legislatures may not levy customs and excise duties, the dominion parliament is entitled to levy direct taxes and license fees. As a matter of fact, taking last year's figures, while the dominion obtains 67 per cent of its revenue from indirect taxation (56.6 per cent from customs and 10.4 per cent from excise) and a small amount from licenses, it also derives large sums from direct taxes in the shape of the business profits war tax, and taxes on banks, insurance and other corporations, on railways, steamship, telegraph and cable companies, etc.; and now there is to be added the income tax.

Land Taxation

It is true that the direct taxation of land is also within the prerogative of the dominion parliament, though it has come through long usage to be currently regarded as the peculiar privilege of the provinces, or their delegates, the municipalities. Indeed, the unpopularity traditionally associated in Canada with all forms of direct taxation has made the provincial legislatures themselves exceedingly modest in the use of their powers in this direction. At all events, they were long content to pass on to the municipalities the responsibility for certain expensive services, together with whatever odium there might be attaching to the necessary direct taxes. Gradually, however, the increasing demands on their resources have driven them to avail themselves more

and more of their right under the British North America act of imposing direct taxation; and recently they have been nibbling with growing confidence at the taxation of land.

One is reluctant to think that the dominion minister of finance contemplates following in this particular the example of the provincial governments, and that his offer to surrender the right to land taxation and licenses, in exchange for a monopoly of the income tax, is in effect an intimation that failing acceptance of his proposal he may raid the provincial hen-roost. To believe so is to presuppose him innocent to an incredible degree of what is common knowledge with respect to the actual state of provincial and local taxation. For the excessive burden imposed on the land owner is already widely recognized as the most glaring inequality of our local tax system. To superimpose on the existing municipal and provincial taxes a federal land tax would surely be the proverbial last straw.

Local Taxation of Real Estate

Theoretical reasoning and historical experience alike show that real estate—land and buildings—is the most suitable object for taxation by local governments, and should therefore wherever possible be reserved for that specific purpose. Within a nation, labor and capital are mobile and tend to leave a locality where the taxation is exceptionally heavy; but the land is fixed, and buildings only slowly wear out. Thus real estate, being immovable, is from the administrative standpoint the one form of property which can be most conveniently subjected to direct taxatiton by the local authority. This very convenience indeed has led to a quite undue reliance on it. For, while the possession of real estate is a good rough test not only of benefit received from certain forms of local expenditure but of ability to pay, it fails entirely as a test where the benefit of such expenditure is not measurable as regards individuals. Now, under our present system much local expenditure, especially in our cities, is of this character. It follows, therefore, that the possession of real estate, and still less that of land alone, should not be the sole standard of local taxation. To treat it as such is to risk the rude awakening that has come to many of the cities and towns of Western Canada.

Licenses

The offer to hand over entirely to the provinces the right to issue licenses need not long detain us. Licenses on the local exercise of certain trades and occupations are an important instrument of police regulation and incidentally a convenient though relatively unimportant source of local revenue. But there are cases where the privilege to be licensed is not confined to one locality, and the license is then more conveniently issued by the dominion. With the suppression of the liquor traffic, however, the revenue to be derived by the federal government from such licenses becomes relatively insignificant and the offer to surrender them accordingly of small moment.

The finance minister's suggestion, then, comes in the ultimate analysis to this: The dominion is to surrender its right to the taxation of land, which has been in abeyance and which, both on economic and political grounds, it might now find it highly inexpedient to assert, and its right to issue licenses, which we have seen to be of small value. And, in exchange for this well-nigh imaginary feast, the provinces are invited to sell their birthright, by abjuring their interest in what is certain to become within a few years the most important of all direct taxes, that on incomes.

Provincial Taxation of Income

At the present time in the urban municipalities of Ontario and Saskatchewan income is taxed in supplement of the taxation of real estate and businesses. The cities of Alberta, too, have obtained the right to levy an income tax, and Edmonton expects this year to reap $100,000 from this source. The privilege, however, has been granted for only two years, and a provincial income tax is said to be in contemplation. Up to the present, Prince Edward Island and British Columbia are the only provinces in Canada that levy an income tax for provincial purposes; and it is to the Pacific Coast Province that we must look for some idea of what may be made of a provincial income tax. In 1899 it yielded less than $10,000; the estimate for the current year is $2,215,000 — by far the largest single item in the revenue of British Columbia. No great powers of prophetic vision are necessary to see that the example of British Columbia is likely ere long to find imitators. Nor should it now be necessary to

say that the dominion minister of finance has scarcely in this matter shown himself sufficiently adroit to play with success the part of Jacob to the provincial Esau.

Under modern conditions it is true that the basis of income is neither local nor provincial but national or even international; and it follows, therefore, that an income tax is more likely to prove productive and equitable in its administration in proportion as its basis is widened. It is thus peculiarly fitted to become an instrument of national finance. But the difficulties of administration which, as the experience of British Columbia shows, have not proved insuperable in the case of a provincial income tax standing alone, are very materially lessened by the existence of a dominion income tax. For the federal income tax, returns need only be made available for the purpose of the provincial tax. Indeed, the co-operation of the federal and provincial assessors would go far towards lessening the possibility of evasion, always a leading difficulty in the way of successful income tax administration.

In this connection, it should be noted that a state income tax has been in successful operation in Wisconsin since 1911, and more recently in Massachusetts, and now a representative committee of the National Tax Association has recommended the general adoption by the states of the union of a personal income tax, as "better fitted than any other to carry out the principle that every person having taxable ability shall make a reasonable contribution to the support of the government under which he lives."

Is there Conflict of Interests?

There seems to be implied in Sir Thomas White's offer the notion that provincial income taxes and the federal income tax overlap, in the sense that the former in a special way compete with and lessen the productiveness of the latter. But this view is based on a singular misapprehension. The sources of tax revenue are not water-tight compartments. Every tax, whether federal or provincial, imposed directly on the income-tax-paying classes, or indirectly shifted by competition to them, so far tends to lessen the income on which taxation can be levied. For all taxes fall on persons, though in many cases nominally imposed on things; all are in the long run open or disguised income taxes. What boots it then if the provincial tax is called by another name, say a land tax. It is only because of the deceptive familiarity of the phrase "taxation of land" that it requires a mental effort—on the part of those who do not own land—to realize that the tax is paid not by the land but by the landowner out of his income from whatever source arising. The only difference is that, taken in this way, the tax may well be less equitably distributed as between individuals than if levied directly on income as such. In any case, it and similar taxes compete with a dominion income tax as much as, or more than, would a provincial tax under that name.

"The idols of the market-place," says Bacon in his well-known classification of fallacies, "are the most troublesome of all —those, namely, which have entwined themselves round the understanding from the associations of words and names. For men imagine that their reason governs words, whilst, in fact, words react upon the understanding." Let Sir Thomas White but undertake even at this late date a systematic study of taxation, and such "idols" will cease to dominate his reasoning. He will at once see that while to supplement a dominion tax on, say, a particular commodity, by a provincial tax on the same article might hurt the dominion revenue by checking consumption, a provincial tax on income can have no more, and may have less, effect in that direction than provincial taxes otherwise levied. Above all, he will quickly realize that, to obtain the requisite increase in revenue for the dominion, it is not necessary to seek to hinder the natural development of the tax systems of the provinces, but that a far surer remedy lies to his hand in the simplification of the customs tariff. He has himself emphatically stated that "the very backbone of the revenues of the dominion is and is bound to be the tariff." Let him then make of the tariff, what at present it assuredly is not, an instrument honestly shaped for the attainment of revenue. In the mother country the great fiscal reformers turned the income tax to effective use in the establishment of such a tariff. In Canada today the statesman with the ability and courage to don the mantle of Peel and Gladstone would most surely earn the undying gratitude of his country, and make for himself an everlasting name.

THE CANADIAN BUSINESS PROFITS AND INCOME WAR TAX ACTS

R. W. BREADNER
Commissioner of Taxation, Ottawa

From an address delivered at the Annual Convention of the Dominion Association of Chartered Accountants, Montreal, September 19, 1918

I. The Business Profits War Tax Act

I will speak first concerning the provisions of the business profits war tax act. I do not intend to enter upon any discourse as to the reasons why such an act was placed on the statute books, but to deal with the administrative features of it. The act became law on the 18th day of May, 1916, but it relates to any accounting period ending after December 31, 1914. A good many persons, especially taxpayers, have the idea that the act applies only to profits made after that date, but the act does not say that. It specifies that it shall apply to each and every accounting period which ended after the date stated, and that it would apply to a period of not less than 36 months. In other words, if the accounting period of a company was the calendar year, the profits made between the 1st of January, 1915, and the 31st of December, 1917, were to be taxable. At the last session of Parliament the act was extended for another year. If the accounting period ended the 31st of January the act would apply to profits made between February 1st, 1914, and the 31st of January, 1917, and since extended to the 31st of January, 1918. In other words, each company that was in existence prior to the 1st of January, 1915, and has not changed its accounting period since that time, will be liable for taxation for 48 months, irrespective of the date when the accounting period starts.

Sub-section (c) of the act refers to taxes paid in the United Kingdom, India, or any dominion, colony, or dependency of His Majesty or any allied country under legislation for raising revenue for the war. It was thought proper at the time that if a tax was paid by a company in Great Britain, say, in respect to its Canadian business, it would be generous on the part of Canada to give credit to the extent of that amount on the tax payable here. Last session it was deemed advisable in view of conditions that had arisen regarding the administration, to repeal that provision. But I may say that sub-section (c) will still apply to accounting periods ending in 1915, 1916 and 1917, its repeal only affecting the 1918 accounting period.

Section 5 sets forth the trades and businesses to which the act shall apply. As originally passed it only applied to trades and businesses having a capital of $50,000 and over; last session the act was amended to include companies, firms and individuals engaged in trade or business with $25,000 capital or over. Foreign companies shipping goods into Canada, on consignment of which the value at any time during the accounting period amounts to the sum of the capital set forth in the act, will be considered as coming within the provisions of the act; this is to prevent foreign companies coming into Canada and selling goods through agents, keeping a stock here or selling on consignment and escaping the tax. If this ruling had not been made it would mean that Canadian companies who have established a warehouse in this country would have this undue competition.

A company incorporated in Canada, whose business is carried on and assets situated entirely outside of Canada, is not subject to the provisions of the act. The same provision was added to the income war tax act during last session of Parliament, the idea being that no harm can come, but in fact good results to Canada by the incorporation of companies, and if the company is not doing business in Canada, but only has its head office here, it should not be liable to taxation under this act, being taxable in other countries.

In the administration of these taxation acts the desire and endeavor of the department has been to look at questions from the standpoint of the taxpayer as well as of the collection of revenue, and if there is doubt the policy has been, as laid down in the customs act, that the benefit of the doubt must be given to the taxpayer. Therefore, when the question came up as to how the tax paid under this act should be treated, the department after careful consideration decided that the tax paid under the business profits war tax act should be considered an expense of the accounting period following that during which it accrued. Now, whether it appears in the accounts of the taxpayer or not, in the preparation of the assessment at Ottawa the tax paid is always so treated.

Another point in respect to profits came up; and in some cases I have no hesitation in saying that it results in what seems a hardship; that is, that losses incurred in one period cannot be allowed as a reduction against profits of a succeeding period. The act sets forth clearly that "such tax shall be levied against and paid by the person owning such business for each and every accounting period ending after 31st December, 1914." The powers of the department are administrative only, and where specific provisions are set forth the department has no power to change them.

Another question of vital importance to those engaged in business at the present time is that of inventories. Owing to the very high prices now prevailing, and the practical certainty of a drop when normal conditions return, the department has ruled that inventories of merchandise shall be taken at cost, or at market values if less than cost. It is no business of the department if a company sets aside a reserve against the contingency of a future fall in prices. But whether any part or the whole of that reserve will be allowed as an expense can only be determined after scrutiny of the returns for assessment purposes, and consideration of the conditions that have arisen after the setting aside of that reserve. The department cannot settle that question in advance.

Another question which affects corporations largely is the treatment of life insurance premiums paid. The department has held that corporation life insurance cannot be regarded as an expense: it is rather an asset; and on the same principle the proceeds that will be realized from such policies will not be treated as profits. We consider that that is a fair ruling. Otherwise, if the persons insured die, under the present rate of taxation, if the profits of the company amounted to 20 per cent, it would mean that the government would be taking practically 75 per cent of that insurance instead of the company.

Another point that came up and was pressed very forcibly until the act was amended, is that profits made during an accounting period should for that period be classed as capital. In the case of one company it would have made a difference of some $10,000. Their accounting period was the calendar year, and they claimed that half the profits should be treated as capital from July 1st. It was submitted to this company's solicitors that if that principle were followed the company would have a right to go farther, and claim a daily balance. You can see what the result would be. So the department ruled that profits made during the accounting period cannot be classed as capital.

Another ruling is that insurance taken as a sinking fund for payment of a mortgage is not considered as an expense.

It was surprising to note the number of firms in Canada, especially in respect to close corporations and private firms, where very small or no salaries were paid to the partners or members who conducted the business of the concerns. In some cases the department was called upon to determine what was a proper allowance to make to these individuals. Since that could not be done by correspondence, it had to be done by personal interview, chiefly by the officials in the different districts where the taxpayers reside. The department has ruled that a reasonable reduction should be made for salaries where no allowance has been made.

The next section has certainly been a bone of contention—that is, the question of capital. What is capital? The first subsection states that capital shall be the amount paid up on its capital stock. Bonds or borrowed money cannot be classed as capital, but the interest paid thereon is considered as an expense of the business. "For the purposes of this act the amount paid up on the capital stock of a company shall be the amount paid up in cash.

Where stock was issued since January 1, 1915, for any consideration other than cash, the fair value of the stock at the date of issue shall be deemed to be the amount paid up on such stock. In estimating the value of stock issued for any consideration other than cash, regard shall be had to the value of the assets, real and personal, movable and immovable, and to the liabilities of the company at the date as of which such value is to be determined."

The department holds that where a trade or business has been converted into a company and the shares in the company are wholly or mainly held by the person or persons who were the owners of the trade or business, no value shall be attached to such shares so far as they are represented by "goodwill" or otherwise than by material assets of the company, unless special circumstances warrant consideration. But patents and secret processes shall be deemed to be material assets. I may say that the ruling I have just quoted is in conformity with the ruling in Great Britain. Another point that has arisen, on which the view of the department will perhaps not agree with that of the accountants, is that impairment of capital does not constitute a reduction of the amount paid up on the capital stock of an incorporated company. The act says "the amount paid up on its capital stock," and there is no provision in the act for any reduction of that amount.

The next sub-section (4) states: "For the purposes of this act the actual unimpaired reserve, rest or accumulated profits of an incorporated company shall be included as part of its capital." Owing to a good deal of controversy during the first year, to remove any doubt that section was amended to provide that the actual unimpaired reserve, rest or accumulated profits held at the commencement of an accounting period by an incorporated company shall be included.

Another amendment provides that dividends paid during an accounting period shall be considered as a reduction of unimpaired surplus, rest, or accumulated profits. If any other principle was followed it would mean that the department would have to employ an army of officials throughout this whole country to investigate each case and ascertain from the taxpayers' books whether the profits were actually made at the time the dividends were paid, that is, during the period in question, or whether made in a prior period. This course was therefore taken to save expense, and it is not a hardship, considering that the tax paid is allowed by the department to be treated as an expense in the following accounting period. These amendments were made for administrative purposes.

The instructions given to the accountants who are handling the returns in the department are as follows: "Your duty is to check these accounts, and be fair to and protect the taxpayer as well as the revenue." If in any case the tax is found to be payable but has not been assessed, we will credit against the profits made during the following accounting period the tax found to be payable.

With respect to the capital of a non-Canadian company the act is very specific; take the Canadian assets of the company and divide that amount by the amount of the total assets, apply the percentage so obtained to the total capital, and you have the capital in Canada. Of course the "capital" includes the unimpaired rest and accumulated profits, etc. The act reads:

> "For the purposes of this Act the capital employed in the business of a non-Canadian company shall be such portion of the amount paid up on its capital stock as shall bear the same proportion to the amount paid up on its entire capital stock as the value of its assets in Canada bears to the value of its total assets."

As to the meaning of the word "unimpaired," the department has ruled that reserves for bad and doubtful debts, or depreciation of plant and machinery or any form of wasting assets, are reserves against impairment of assets and therefore cannot be classed as capital.

When the act was passed we had a great many applications from those who wished to be members of the boards of referees. I want to say that owing to the patriotic spirit displayed by the taxpayers, the government has not been called upon yet to appoint a board of referees.

The act provides that the tax shall be payable within one month of the date of mailing the notice of assessment, and in default of payment, interest at 7 per cent per annum shall be paid. If the assessment is not made the responsibility is not on the company, but on the department.

And as to that, I consider that it is far better for the department to be sure and to get the full amount of tax that is rightfully payable rather than hastily fix an arbitrary amount which may be much below what it should be; or, on the other hand, to have to deal with an appeal case. By that course the administration will be ahead much more than the small amount of interest lost; we have also the good-will of the taxpayers, which is very essential where we are covering, from a center at Ottawa, the whole dominion. The assessment of a municipality is an entirely different matter. There the assessor can come in contact with the taxpayer at once. The maximum staff employed throughout the whole dominion during any one year, including the staff at Ottawa, in the administration of the business profits war tax act, was forty, half of whom were stenographers and typists. Often it was much less. The principle we followed was that this was a temporary act. The department could have put on a large staff, run up a heavy expenditure and completed the work in four or five months, and for the rest of the year the staff would have been idle, or else we would have had to release them and hire a new staff for the next year, resulting in lack of uniformity. It was considered more advisable to have a permanent organization for the three years and preserve uniformity of administration. The department expects that the tax payable during the three years the act was originally intended to cover will be collected by the close of the fiscal year.

[At this point the following questions were asked and answered.]

Q.—I would like to ask a further expression as to the attitude you propose to take with respect to inventory reserves. I understand your position is that the taxpayer may set up whatever reserve he deems advisable, but you reserve the right to disallow that or deal with it as you think fair. Suppose an inventory so taken; the goods have since been sold at a profit; will you say that that is a taxable profit even though the taxpayer had to turn around immediately and invest a still larger amount in goods at prices still further enhanced and so has still in prospect a future loss?

A.—If there has been no loss incurred at the time the returns are scrutinized, why should any allowance be considered? It is a question that must be left largely to the judgment of the officials dealing with the matter. We cannot lay down any set rule. We had a case not long ago of a company handling a line of goods in which there was a material drop in prices. At the date of the returns the stock was set forth as being worth a certain amount. In determining the assessment six months afterwards those factors were taken into consideration. I cannot impress upon you too strongly, gentlemen, that in the administration of this act the department desires to deal fairly with the taxpayer.

Q.—I am convinced of that: I think, however, the solution depends on whether or not this tax is to be a continuing measure; if it is only for a three-year period, and if at the end of that time the dealer is still carrying a stock at prices much above normal, and so facing a future loss, that is not provided for in assessing his tax.

A.—That statement is correct. All I can say is that the taxpayer must trust to the fairness of the department when it makes his assessment for the next year. No rule can be made in advance setting forth any exact rate that would be allowable. It would depend on many factors, of which the department must be the judge; subject, of course, to the taxpayer's right of appeal if he sees fit.

Q.—It may be of interest to point out that the English authorities have passed legislation allowing two years after the cessation of hostilities within which loss on stocks carried over may be adjusted and deducted from the tax.

A.—There is no such provision here.

Q.—In regard to inventories and goods that have gone out of fashion or become shop-worn, is it expected that the merchant (I speak with special reference to the small trader) shall take these goods at cost price and a deduction made at the foot of the inventory and that deduction set out on his return? Generally a merchant in taking stock, prices such goods at what he considers them worth to him, and in fixing his selling price he bases it on the last current inventory price, so that unless he used two columns of prices he would not know just what he had taken off. Would he be accused of an evasion of the act by taking them at the price he considers them worth?

A.—Where the market value of merchandise is less than its cost, owing to being out of fashion or for other reasons, a mer-

chant, in my opinion, would be justified in taking it in at what he thinks its fair value at the time the inventory is taken. As to the price being reasonable—that is subject to the approval of the department.

There is one other point in respect to the business profits war tax act which I wish to mention. Many taxpayers—and by that I mean taxpayers as defined by the act, section 2 — are inclined to decide for themselves as to whether or not they are taxable, and so neglect to file returns. Now the act places the responsibility for filing returns on the taxpayer. In addition to that, the department has during the last three years forwarded forms for returns by registered mail to those who are deemed liable to taxation under this act. The receipt of those forms requires the making of the returns called for; whether the tax is payable or not, the department will be the judge. But every person who receives the forms should file returns; and they will be followed up unless they do so.

See page 116.

TAXABLE NET INCOME UNDER THE NEW YORK LAW

J. F. ZOLLER
Tax Attorney of the General Electric Company

My attention has been called to a very carefully prepared article by Mr. H. M. Powell in your December issue concerning the deduction of the excess profits taxes in arriving at the net income taxable by the State of New York under Article 9-a of the New York tax law. In this article Mr. Powell refers to the terms "entire net income" and "net income" stated in sections 211, 214, 217 and 219-d of the New York act, as if such terms had a well-defined meaning in themselves, whereas as a matter of fact such terms in themselves would be meaningless in any tax act and are meaningless as used in the sections referred to by Mr. Powell unless such sections are read in conjunction with section 209. As read in conjunction with section 209, the term "net income" or "entire net income" means the income upon which the corporation is required to pay a tax to the United States. In order to determine the income upon which the corporation is required to pay a tax to the United States resort must be had to the federal statute which clearly determines net income by taking the gross income and deducting therefrom certain specified deductions, mentioned in the federal act. Therefore in order to give the term "net income" or "entire net income" any meaning whatever, as used in sections 211, 214, 217 and 219-d of the New York statute, reference must be had both to section 209 of the New York act and to the federal income tax act.

Under the federal income tax act certain deductions are made from gross income in ascertaining the tax base for the purpose of determining either the income tax or the excess profits tax, as follows:

Section 12 of the federal act of September 8, 1916, as amended by the federal act of October 3, 1917, provides the following deductions from gross income:

"First. All ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.

"Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade.

"Third. The amount of interest paid within the year on its indebtedness (except on indebtedness incurred for the purpose of obligations or securities, the interest upon which is exempt from taxation as income under this title) to an amount of such indebtedness not in excess of the amount of (a) the entire amount of the paid-up capital stock outstanding at the close of the year, or, if no capital stock, the entire amount of capital employed in the business at the close of the year, and (b) one-half of its interest-bearing indebtedness then outstanding.

"Fourth. Taxes paid within the year imposed by the authority of the United States (*except income and excess profits taxes*) or its territories, or possessions, or any foreign country, or by the authority of any state, county, school district or municipality or other taxing subdivision of any state, not including those assessed against local benefits."

Section 29 of said federal act provides a deduction as follows:

"That in assessing income tax, the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by Act of Congress and assessed for the same calendar or fiscal year upon the taxpayer."

Section 203 of said federal act provides for other deductions in arriving at the excess profits tax as follows:

"(1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the pre-war period was of the invested capital for the pre-war period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and

"(2) $3,000."

The deductions above mentioned under said section 203 are applied in determining the base of the excess profits tax, such tax being determined under section 201 of the federal act as follows:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided. See section 203 above) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

The deduction referred to under the 20 per cent bracket above mentioned is the deduction specified under section 203 above quoted. As before stated, in order to get a clear understanding of the meaning of the term "net income" or "entire net income" as used in the New York statute, resort must be had to the federal act and the deductions there specified considered, so as to determine "net income" or "entire net income" as contra-distinguished from gross income. The term "gross income" has a well-known meaning, whereas the term "net income" is, in any tax act, the difference between the gross income and the deductions permitted in the act in arriving at the net income subject to the net income tax.

In his article Mr. Powell says:

"The crux of the inquiry is to ascertain from the New York statute whether the legislature intended that the tax should be levied on the *entire* net income, which is used as the base of the excess profits tax, or whether it should be levied on the "entire net income" less the excess profits tax under the federal income tax law of October 3, 1917."

As a matter of fact, the state tax department does not propose to assess the state income tax either upon the amount upon which an excess profits tax is assessed by the federal government nor upon the net income upon which a federal income tax is assessed by the federal government but on an amount which neither represents the base of the excess profits tax nor the base of the federal income tax. A simple illustration will prove conclusively this obvious fact.

Take a corporation with invested capital, gross income and deductions as follows:

Invested capital, say		$200,000
Gross income, say		200,000
Deductions under income tax law, section 12, above quoted, say		130,000
Deduction under section 203, for the purpose of the excess profits tax, made up, say, as follows:		
9 per cent of invested capital	$18,000	
Specific deduction	3,000	
Total deductions under section 203		21,000

The excess profits tax and the income tax under the federal act for the above mentioned corporation would be figured as follows:

EXCESS PROFITS TAX

First Step

Gross income		$200,000
Total deductions under section 12, above quoted		130,000
Remainder		70,000
Second Step		
Deduction under section 203		21,000
Subject to excess profits tax		$49,000

This amount of $49,000 subject to the excess profits tax is taxed as follows:

20% of first	$9,000	or a tax of	$1,800
25% of next	10,000	or a tax of	2,500
35% of next	10,000	or a tax of	3,500
45% of next	16,000	or a tax of	7,200
60% of the last	4,000	or a tax of	2,400
Income taxed	$49,000	Excess profits tax	$17,400

The amount of income which is used as the basis of the excess profits tax is not $70,000, because $21,000 of this $70,000 is exempt from the excess profits tax under section 203 and the balance only, or $49,000, is subject to the excess profits tax. Therefore, the basis of the excess profits tax is $49,000 and *not* $70,000.

INCOME TAX

First Step

Gross income	$200,000
Deductions under section 12	130,000
Remainder	$70,000

Next Step

Deduction under section 29 or amount of the excess profits tax	17,400
Amount subject to income tax	$52,600

Now as a matter of fact, it will be noted from the foregoing illustration that the amount of income subject to, or the basis of, the excess profits tax is $49,000 and the income subject to, or the basis of, the income tax is $52,600. The state tax department does not propose to assess the state income tax, in the above illustration, upon either $49,000 or upon $52,600, but upon $70,000, which is an amount which represents neither the basis of the excess profits tax nor the basis of the federal income tax. It would seem to follow, if the crux of the situation, as stated by Mr. Powell, is whether the base of the federal excess profits tax or the basis of the federal income tax is to be used in determining the state income tax, that Mr. Powell is assuming that the state tax department proposes to use one or the other of these bases in determining the state tax. This assumption is not in accordance with the facts because the state tax department proposes to use neither of these bases. Therefore, Mr. Powell's article, being written upon an erroneous assumption of facts, would seem to fall of its own weight, notwithstanding the learned discussion of the law contained therein.

Mr. Powell further states:

"If the corporation's entire business is transacted in New York State, the tax 'shall be based upon the entire net income of such corporation for such fiscal or calendar year as returned to the United States Treasury Department.' If it were intended to permit a deduction of an excess profits tax amounting in many cases to 50 or 60 per cent of the entire net income, the phrase that the corporation might be taxed in certain cases upon its 'entire net income' would be more or less meaningless."

The matter quoted from Mr. Powell's article refers to section 214, which provides for the taxation of both intrastate and interstate commerce corporations and simply means that if the entire business be transacted in the State of New York the corporation shall be taxed upon the entire net income upon which it pays a tax to the United States; but if the business be transacted both within and without the State of New York, the corporation shall be taxed upon such a portion of the entire net income upon which it pays a tax to the United States as the value of certain property in the state bears to the entire property of the corporation taxed. The statement, therefore, read in the light of its intention, is not meaningless but has a very clear and well-defined meaning and is for the purpose of distinguishing between corporations transacting all their business in the state and corporations transacting business both within and without the state.

Mr. Powell also states near the close of his article as follows:

"A corporation paying no excess profits tax returns its total net income for income tax payment, and a corporation paying excess profits taxes returns its total net income upon which it pays a tax to the United States."

As a matter of fact, if the action of the state tax department be sustained, a corporation paying no excess profits tax would, as suggested by Mr. Powell, pay a tax to the state upon the net income upon which it paid an income tax to the United States, but a corporation paying an excess profits tax to the federal government would, if the contention of the state tax department be sustained, pay a tax to the state not upon its net income but on an amount in excess of its net income, which amount, as shown in the above illustration, would represent neither the basis of the federal income tax nor the basis of the federal excess profits tax.

My attention has also been called to another article in the December issue under the heading of *Decisions and Rulings* by Mr. A. E. Holcomb, reading as follows:

"The New York law taxing the net income of manufacturing companies also makes use of the

federal forms. By section 209 of that law a tax was imposed 'to be computed upon the basis of its net income, upon which income such corporation is required to pay a tax to the United States.' The force of this section has been weakened if not destroyed altogether by the amendment of 1918 by which the income upon which the state tax is laid is only 'presumably' the same as that upon which the federal tax is paid. The results of this change are likely to be far-reaching, it being now, we understand, the custom for the corporations to prepare their returns without regard to the limitations of the federal law, and as there is little likelihood of state audit, the resulting situation would appear to be most uncertain and unsatisfactory."

A study of the amendment of 1918 discloses that the legislature intended to permit the state tax department to change the net income as determined by the federal government only in cases of "fraud, evasion or error, as ascertained by the state tax department." This change is provided for under section 214, which reads:

"If the entire business of the corporation be transacted within the state, the tax imposed by this article shall be based upon the entire net income (upon which it pays a tax to the United States. See section 209) of such corporation for such fiscal or calendar year as returned to the United States treasury department, subject, however, to any correction thereof for "fraud, evasion or error, as ascertained by the state tax commission."

It is obvious that if the state tax department was to have power to correct such income in cases of fraud, evasion or error, it was necessary to change section 209 so as to provide that the income was "presumably" the same as the income upon which the corporation was required to pay a tax to the United States. If this change had not been made in section 209 it would have been in conflict with section 214, as amended. In other words, the corporation is now taxable by the state upon net income which is presumed to be the net income upon which it is required to pay an income tax to the United States. This presumption can be overcome only in the case of "fraud, evasion or error" discovered by the state tax commission.

As to the assertion by Mr. Holcomb that corporations are preparing their returns to the state without regard to limitations of the federal law, I have to advise that question 5 of the form of report submitted by the state tax department requires the corporation to state the "net income as determined by United States treasury department." It does not seem possible that corporations are not correctly answering this question nor that the state tax department would accept a report which did not contain the information required in the report.

As the state law obviously imposes a tax upon the income "upon which such corporation is required to pay a tax to the United States" (section 209), it would seem, in the absence of "fraud, evasion or error," that the income taxable by the state would be the income upon which the federal income tax was based. In case of "fraud, evasion or error," it would be the income upon which the federal income tax would have been based in the absence of such "fraud, evasion or error." Under such construction corporations generally would be required to pay on a uniform basis. Under the construction contended for by Mr. Powell, corporations paying an excess profits tax would pay on an entirely different basis than corporations that did not pay an excess profits tax. Under the construction contended for by the state tax department corporations paying an excess profits tax would pay on an amount which we have shown does not represent the basis of any tax payable by the corporation to the United States, thereby ignoring entirely section 209 of the state act.

NOTES AND NEWS ITEMS

THE EDITOR RETURNS

Professor Fairchild returned to New Haven on the first of January, after three months' stay in New York, where he conducted an investigation of the public debts of the belligerent powers for the State Department, the results of which are to be used by the American delegates to the Peace Conference. The office of the Secretary of the N. T. A. and Editor of the Bulletin is now located in New Haven, Conn., as formerly.

NEW HAMPSHIRE ASSESSORS' MEETING

The eighth annual meeting of the Association of New Hampshire Assessors was held in Manchester, New Hampshire, on December 18 and 19. We have received a copy of the program, which is interesting reading and leads to the belief that those present must have had a profitable and enjoyable time.

Among the topics discussed were "Timber taxation," by W. D. Veasey; "War production of lumber in Great Britain," by Edgar C. Hirst, the state forester; "The collection of taxes in cities," by Henry H. Davis, chairman of the board of assessors; "Blodgett's rule and other measures affecting taxation," by John T. Amey, state tax commissioner; and other phases of the general subject of taxation. Mr. Earl C. Gordon explained the tax commission's system of municipal accounting, and one fellow member, Judge William B. Fellows, played a conspicuous, and we surmise entertaining, part on the program.

RHODE ISLAND TAX OFFICIALS' ASSOCIATION

The seventh annual meeting of the Rhode Island Tax Officials' Association was held at the state house in Providence on December 11, 1918. The meeting was largely attended and one of the most interesting held by the Association. His Honor, Joseph H. Gainer, mayor of Providence, delivered the address of welcome, the response to which was made by Hon. Everett P. Mathewson of Hopkinton.

The business session was opened with an address by His Excellency R. Livingston Beeckman, governor of the state, in which he urged upon the assessors strict compliance with the law in regard to full value for assessments, and pledged his unqualified support to all tax officials in the faithful performance of their duties.

Addresses were made by two speakers, prominent in matters of taxation from outside the State. Hon. George Pottle of Lewiston, Maine, former member of the board of state assessors, spoke on "The state board and the local assessor," and Charles J. Tobin, Esq., of Albany, N. Y., secretary of the New York State Tax Association, spoke on "The influence of state associations on improved local assessments."

During the recess luncheon was served, at which all present were the guests of the board of tax commissioners. The afternoon session was opened by President John W. Ramsbottom of the board of assessors, Pawtucket, with the annual address. President Ramsbottom reviewed briefly the activities of the association for the year and gave numerous valuable hints and much sound advice to local assessors.

The report of a committee, appointed by the association, to consider the advisability and practicability of fixing by statute a uniform date for assessment, was presented by Walter W. Burnham, chairman of the Providence board of assessors. The committee's report urged both the necessity and feasibility of fixing a uniform date for assessment, and recommended June 15 as the date. After considerable discussion, the report of the committee was unanimously adopted and the committee was continued with instructions to adopt a bill embodying its recommendations and to present the draft to the legislature and urge its passage.

VALUATION OF IRON ORE IN MINNESOTA

The full value of merchantable iron ore, mined and unmined, subject to taxation in Minnesota on May 1, 1918, as equalized by the Minnesota Tax Commission was $603,679,452. Under the classified assessment law iron ore is assessed at 50 per cent of full value and the 1918 assessment total is therefore $301,839,726. All other property in the state is assessed at from 25 to 40 per cent of full value, iron ore being the highest classification.

The 1917 assessed value of iron ore was $295,249,926, and the increase is $6,589,800.

A comparison by counties between the May 1, 1917 and May 1, 1918 assessments, also the number of tons of merchantable ore on which the assessment is based, is shown by the following tables:

	May 1, 1917	
	Tons	*Assessed Value*
St. Louis	1,234,757,950	$268,770,540
Itasca	158,624,443	19,070,871
Lake	333,719	145,645
Crow Wing	70,159,848	7,262,870
Totals	1,463,875,960	$295,249,926

	May 1, 1918	
	Tons	*Assessed Value*
St. Louis	1,219,237,725	$274,104,935
Itasca	157,238,033	19,879,089
Lake	169,288	68,622
Crow Wing	70,198,679	7,787,080
Totals	1,446,843,725	$301,839,726

The tonnage and grade of ore are determined by the School of Mines of the University of Minnesota and the assessed values are fixed by the tax commission.

During the twelve-month interval between assessments approximately 46,000,000 tons were shipped from Minnesota mines, breaking all previous records. Despite this it will be noted that the total tonnage reported decreased but 17,032,235 tons, indicating the discovery of a considerable amount of new merchantable ore. The Cuyuna range in Crow Wing county actually shows a slight increase.

The gain in assessed value despite the decrease in tonnage is due to readjustments made by the commission chiefly because of the general increase in price levels.

Of the total tonnage reported as of May 1, 1918, 1,439,817,938 represented ore in the ground, assessed at $293,602,140, as compared to 1,455,568,770 tons on May 1, 1917, assessed at $291,317,150.

Ore in stock pile this year aggregated 7,025,787 tons assessed at $8,237,586, as compared with 8,307,190 tons in 1917 assessed at $3,932,776.

Estimating the average tax rate in the districts where mineral properties are located at 35 mills (3.5 per cent) the total ad valorem tax for state, county, school and municipal purposes will be $10,564,390 for 1918 payable in 1919. Of this amount $1,056,439 will be credited to the state revenue fund. The state rate is 3.5 mills, but the local rates have not yet been ascertained and must be estimated. An average for all purposes of 35 mills is considered conservative.

In addition to its share of the general property or ad valorem taxes on mining properties the state obtains for its own use 5 per cent of the total cost of transporting ore from the mines to Lake Superior ports, in the shape of the gross earnings tax on railroads. This year the freight rate is one dollar per ton, and estimating the shipments at 45,000,000 tons for the calendar year we have a transportation revenue of $45,000,000, of which the state gets 5 per cent or $2,250,000. Adding this to the general property tax of $1,056,439 which the state will receive, we get a total direct state revenue from mining properties of $3,306,439 for 1918 payable in 1919.

Included in the total iron ore mined for 1918 are 4,634,671 tons from lands owned by the state of Minnesota and leased to mining companies. The royalty on this amount of ore paid to the state aggregates $1,158,668 (up to November 16), making the total state receipts from all sources on account of this class of property $4,465,107 for 1918 as compared to $3,842,120 for 1917, an increase of $622,987 or more than 18 per cent.

The figures given as to assessments include only iron ore valuations and do not include surface values or structures and improvements on mineral lands.

Henry A. S. Ives.
Secretary Minnesota Tax Commission

FLORIDA TAX COMMISSION ABOLISHED

A letter from the secretary of the Florida tax commission informs us of the action of the state legislature by which the commission has been abolished. This was done at an extra session called apparently for other purposes. This is a hard blow to the cause of tax reform in Florida, and its advocates are feeling disappointed and somewhat discouraged. It simply means that work must start again from the beginning. We are confident that this means, not failure, but merely delay, and we hope that our Florida friends will soon take courage and be in the fight again, with better results in the near future.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME TAX — DIVIDENDS — PARENT AND SUBSIDIARY CORPORATIONS. — Since the decision in *So. Pac. Co.* v. *Lowe* (247 U. S. 330), it was almost a foregone conclusion that the decision of the circuit court of appeals in the *Gulf Oil* case would be reversed, but it is helpful to have the further explanation of the principles involved in these cases as well as those in *Lynch* v. *Turrish* and *Lynch* v. *Hornby*. The opinion by Mr. Justice Holmes emphasizes the difference between a dividend declared "in the ordinary course" by a corporation and one which is merely a bookkeeping transaction, resulting in a transfer of assets from one corporation to another in the same business unit. It is held, following the prior decisions, that the payment after the date of the income tax law of a dividend from earnings accumulated before, does not, as between such corporations, constitute taxable income. The principle is extended to a case where the parent corporation was not, as in the *Southern Pacific* case, doing the business of the subsidiaries and in possession of their property, but where the corporations were operating separately. The principle is held to be the same.

Incidentally it may be pointed out that the report of this case in the district court (242 Fed. 709) will be found to contain helpful suggestions as to the detailed steps which a taxpayer should follow to protect his rights and to lay a foundation for relief in the courts.—*Gulf Oil Corporation* v. *Lewellyn*, U. S. Sup. Ct., December 9, 1918. See N. T. A. Bul. III, 102, 248.

INCOME TAX — "TAX FREE" RENTAL CONTRACTS.—In a series of cases, the court of common pleas of Philadelphia County has construed tax clauses in certain railroad leases, with respect to whether or not they require lessees to pay federal income and excess profits taxes assessed against lessors. In one class of cases the clause required the lessee to pay "all taxes, charges, licenses and assessments now or hereafter lawfully imposed upon" lessor. In these cases the court holds that as the lessor is the "subject" of taxation under the federal tax laws, lessee is clearly bound to pay the taxes assessed against lessors based upon the income represented by the rental, following *No. Penn R. R. Co.* v. *P. & R. Ry. Co.*, 249 Pa. 326. In other cases the clause in question provided that lessee should pay and distribute among the stockholders of lessor a certain amount per annum on each share of stock and also to pay "all taxes . . . assessed on the said real estate, franchises, stock, dividends, earnings and license fees on each car." Here it was held that whether the amount to be paid to the stockholders of lessor was to be regarded as dividends or rental, the effect was the same and it could not have been intended that lessee should pay the federal taxes levied upon lessor, following *Catawissa R. R. Co.* v. *P. & R. Ry. Co.*, 255 Pa. 269 (99 Atl. 807).

The determining factor was held to be whether the tax is laid on the lessor as a "subject" of taxation or upon the real estate, dividends, capital stock, &c., as "objects" of taxation. The federal taxes were regarded as laid upon lessors with respect to *their* income. — *Union Traction Co.; Ridge Ave. Ry.; Continental Pass. Ry.; Phila. & G. R. R. Co.* and *G. & C. St. Phila. Ry.* v. *Phila. R. T. Co.*, 27 Pa. Dist. Rep. 977-980.

Reference may be made to the case of *Little Schuylkill Nav., R. R. & Coal Co.* v. *Phila. & Reading Ry. Co.*, 44 Pa. Co. Ct. Rep. 197, where the covenant in the lease required lessee to pay "all taxes, charges and assessments which, during the continuance of the term hereby demised, shall be assessed or imposed upon any existing or future law on the demised premises or any part thereof, or on the business there carried on, or on the receipts, gross or net, derived therefrom, or upon the capital stock of the Little Schuylkill Company or the dividends thereon, or upon the franchises of the said company, for the payment or collection of any of which said taxes the Little Schuylkill Company may otherwise be or become liable or accountable under any lawful authority whatever."

Under this apparently all-embracing clause, the court held that the lessor was

not liable for United States income taxes computed upon the rental received from lessee and from other sources, less deductions. The court observes that the income tax is a tax upon incomes derived from various sources and not a tax upon property as such [Black (2nd Ed.), Chap. IV, §§187-189; Foster (Ed. 1915), 161, 196; *Brushaber* v. *U. P. R. R. Co.*, 240 U. S. 1; *Drexel & Co.* v. *Com.*, 46 Pa. 31-40], and quotes an extract from Chief Justice White's opinion in the *Brushaber* case to the effect that the civil war income taxes were generally classed under the head of excises, duties, and imposts, and that this practical construction came in theory to be the accepted one.

The cases of *Robinson* v. *Alleg. Co.*, 7 Pa. 161; *Erie & P. R. R. Co.* v. *Penn R. R. Co.*, 208 Pa. 506, and *Pettibone* v. *Smith*, 150 Pa. 118, are cited, as well as *Haight* v. *Railroad*, 6 Wall 15, a case arising under the revenue act of 1864, involving a claim for the payment by mortgagor of interest on a mortgage without deduction for income tax, under a covenant obliging the mortgagor to pay the said interest "without any deduction, defalcation or abatement to be made of anything for or in respect to any taxes, charges or assessments whatever." It was held in this case that the clause referred to taxes upon real estate; that there was no special contract to pay government taxes upon interest and that to hold otherwise would cast an obligation upon mortgagor "to pay not only his own taxes but those of mortgagee."

The decision in *Van Beil* v. *Brogan* (23 Dist. Rep. 1055) is referred to as involving a similar question. In that case the covenant was to pay rent "without any deduction, defalcation, or abatement for any taxes, charges or assessments whatsoever," and to pay all taxes "as well on the said hereby granted lot and buildings thereon erected or to be erected as on the said yearly rent now charged thereon." Here the clause was held not to render lessee liable for income tax on the rental paid to lessor.

[Since the above was written, it has been learned that the decision in the *Little Schuylkill* case was affirmed by the superior court (69 Pa. Super. 122), upon the authority of the *Catawissa* case, *supra*, and that an allocatur to the supreme court was refused; also that the decision in the case of *Van Beil* v. *Brogan* was reversed by the superior court (65 Pa. Super. 384), and upon appeal to the supreme court after two arguments, the superior court's decision was affirmed, two opinions being rendered which have not yet been reported.]

Income Tax — Deduction of State Tax on Shares, Paid by the Company. —The general rule is that taxes on shares of national banks paid by the bank, being in reality taxes of the shareholders, must be reported as income by them and are allowed as a deduction to them. A statute of Florida (Comp. Laws, § 435) provides that the owner of stock in a corporation shall not be taxed for such stock, provided either that the stock is returned by the corporation and a tax paid thereon or the property of the corporation is assessed and taxes paid thereon. Under this statute it is held that taxes paid by a trust company are properly deductible as its taxes in arriving at net income under the corporation excise and income tax acts.—*U. S.* v. *Guaranty Trust & Sav. Bank*, 253 Fed. 291.

Suits to Restrain Collection of Federal Taxes—Meaning of Restrain. —Sec. 3224 Rev. Stat. (Comp. St. 1916, § 5947) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In a recent case an additional internal revenue tax was assessed and a levy was made upon the taxpayers's real estate which was sold by the collector to satisfy the tax and bid in by the government. Suit was brought against the collector of internal revenue to cancel the sale and for relief from the assessment which was alleged to have been illegally made. The question arose whether this suit was prohibited by the above statute; whether "restrain" was to be construed in its narrow sense as prohibiting the issuance of restraining orders and injunctions or whether it applies to all suits to hinder or impede the collection of a tax. The court reviews various decisions and concludes that the question has not been bindingly construed and is therefore at large. Upon full consideration it is held that the word should not be construed in its narrow technical sense as prohibiting injunc-

tion orders only, but any action to impede the government in the collection of the tax; that the remedy given the taxpayer by statute—payment and suit to recover—(Comp. St. 1916, §§ 5947, 5949, 5950) was exclusive. The suit was held not maintainable for another reason, in that in effect it was a suit against the government and therefore not maintainable except as specifically provided. — *Gouge* v. *Hart*, 250 Fed. 802. [The appeal in this case is now on the docket of the United States Supreme Court.]

Railroad Taxes under the Federal Control Act. — Much controversy has arisen at different points over the status of the railroads as affected by their operation by the federal government. The situation is far from settlement and doubtless litigation will follow the attempt by the states to collect license, privilege, and franchise taxes from the roads. So far as the federal government is concerned the question has apparently, in a measure, been settled as the non-liability to the United States capital stock has been admitted, as appears from the following extracts from a letter written by the Commissioner of Internal Revenue to the General Counsel of the United States Railroad Administration, dated November 19, 1918:

"Referring to the telephone call on Saturday last from your office relative to a certain opinion rendered by the solicitor of internal revenue I have to state that the opinion in question dealt with two questions.

"(1) The first was whether a corporation taken over by the government under the proclamation of the president and legislation pertaining to the same matter, with which you are, of course, perfectly familiar, and whose sole activities now consist of the receipt and distribution among its stockholders of the compensation paid by the government, is liable to the capital stock tax imposed by section 407 of the act of September 8, 1916. (Excise tax with respect to 'the carrying on or doing business.') It was concluded that this question falls exactly within the scope of the decision of the supreme court in the case of *McCoach* v. *Minehill Railway Company*, 228 U. S. 295, Treasury Decision 1847, wherein it was held that a company whose operations consisted only 'of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders' is *not* engaged in business. It was decided in view of this decision that it must be held that a railroad company whose sole activities consist of the receipt and distribution of the compensation received from the government is likewise not engaged in business.

"(2) The second question dealt with a railroad corporation which, while its activities as a carrier have been taken over by the government, still owns and operates a coal mine. The question was whether the tax which this concern is required to pay is to be measured by its entire capital stock. It was held that under such circumstances there could be no doubt that the company is engaged in business. The supreme court in the Minehill case, *supra*, which dealt with the corporation excise tax act of August 5, 1909, stated that in the case of 'The receipt of income from outside property or investments by a company that is otherwise engaged in business . . . the investment income may be added to the business income in order to arrive at the measure of the tax.' It was held that the same principle is applicable to the question raised; that the act of September 8, 1916, generally speaking, makes no provision for the assessment of tax on part of the capital stock of a corporation; and that these concerns which are liable at all are liable on their entire stock in excess of $99,000.00.

"The conclusions reached may be summarized as follows:

"(1) A corporation owning a railroad, the possession, use, control, and operation of which has been taken over by the government, and whose only activity now consists of the receipt and distribution of the compensation received from the government, is not liable to the capital stock tax.

"(2) A railroad corporation which, in addition to the compensation from the government, receives income accruing from the operation by the corporation of a coal mine, is liable to the tax on the entire value of its capital stock in excess of $99,000.00.

"A treasury decision covering this subject will in all probability be published shortly and copies thereof will be procurable upon request."

This view seems fully supported by the decisions rendered since that in the *McCoach* case. See for instance, 216 Fed. 83; 219 Fed. 184; 222 Fed. 177; 228 Fed. 295; 233 Fed. 976; 238 Fed. 533; 246 Fed. 625, and 206 Fed. 431, which was dismissed in the U. S. Sup. Ct. on motion of the U. S. (234 U. S. 765).

Internal Revenue Taxes—Effect of Assessment.—It is held that, as the list of assessments made by the commissioner of internal revenue and certified to the collector has the force and effect of a judgment and execution and makes a *prima facie* case of liability in favor of the government in an action to recover the taxes so assessed, the appropriate proof in an action by a surety company to recover on a bond given to secure the payment of taxes, is a certified copy of the list. The mere oral evidence of the assessment is insufficient as not being the best evidence.—*National Surety Co.* v. *Brock*, 17 S. E. 417.

ASSESSMENT OF REAL PROPERTY — VALUE OF A MANUFACTURING PLANT — MACHINERY AS REAL PROPERTY.—The assessment of a large manufacturing plant covering several city blocks, was the subject of a recent decision by the Wisconsin Supreme Court.

The plant was equipped with various kinds of machinery adapted for the purpose of the manufactory, ranging from very small machines to those weighing thirty or forty thousand pounds and for the most part held in position by their own weight and neither bolted nor screwed to the floor. The machines were occasionally moved from one part of the factory to another. Only one machine required a pit for its operation and that machine could be moved with no structural change other than filling the pit. It was agreed that the buildings were to be considered as standing upon land owned by the company and that the question of fixtures as between landlord and tenant was not to be considered. The machinery in question was assessed as real estate or land improvements. The relator claimed and the circuit court held that it was personal property.

The supreme court reverses the lower court, holding as it states, upon the authority of a "long line of decisions" which it cites, that "when machinery adapted to the purposes of a manufacturing plant is installed therein and connected to the building by wires or belts, such machinery becomes a part of the freehold, and the land, buildings, and machinery so attached constitute an entity, and pass by deed, mortgage or other conveyance of the land."

To the claim that the practice of the company of carrying the machinery on its books as personal property constitutes evidence of intent to treat it as such, the court replies that "where property is adapted to the use to which the realty is devoted, the use thereof in such manner furnishes such strong evidence of intent to make it a part of the freehold as not to be overcome by bookkeeping practices."

Further objection to the assessment was made upon the ground that it was made arbitrarily and was therefore illegal. It appeared that the assessor started at a certain point with a certain front foot value and reduced that unit by blocks ($5 per block) as he proceeded away from the starting point. The court examined the evidence carefully, extracts being shown in the opinion, and arrived at the conclusion that there was no failure to observe the requirements of the statute.

Further objection was made because the assessor valued the land and the buildings separately and added the values together, whereas he should have valued both together and then apportioned that value. The method pursued by the assessor is approved as strictly complying with the statute.

Further objection was made because the assessor was evidently guided mainly in his assessment of the buildings and machinery by the cost thereof from which due allowance for depreciation was made. It was argued that such a method was in disregard of the statutory requirement that property should be assessed "at the full value which could ordinarily be obtained therefor at private sale"; that the method pursued did not produce such value. To this it was replied that the objection was not coupled with any suggestion of a better method; that it was a matter of common knowledge that such plants were not the subject of such frequent transfer as to establish a market value by that process; that the president of the concern had testified that he could not say what the plant was worth as a unit because of the lack of purchases of the sort. The court rules that it can think of no better method than that adopted; that the question of whether the business was a paying one might be a material circumstance in valuing the improvements, but that in this case the history of the concern shows that on the whole it has been a profitable one; and that there is no reason shown why the original cost less depreciation should be further reduced to arrive at the value which might be expected to be obtained therefor at private sale.—*State ex rel. Gisholt Mfg. Co.* v. *Norsman*, 169 N. W. 429.

LEASEHOLDS.—The Washington statutes (Hemingway's Code, § 6923) provide that state school lands leased shall continue to be taxed during the continuance of the lease "as other lands." It was claimed that under the uniformity provision of the constitution, only the leasehold interest in such lands could be taxed. This claim was rejected as contrary to the plain language of the statute under which no particular

interest in the lands was required to be taxed. It is admitted that the question is one of first impression in the state. The case of *Street* v. *Columbus* (23 So. 773) and a quotation from Cooley are cited, the latter announcing the general statutory rule to be that real estate should be assessed as such, irrespective of the separate estates of individuals therein and that the person who, for the time being, enjoys the possession of the estate and the permanency of the profits, may be charged with the tax (Cooley on Taxation, 3rd ed., vol. I, p. 739).—*Supervisors* v. *Whittington*, 80 So. 8.

Assessments for Benefits—Railroad Lands.—It is held as to railroad land, fit only for right-of-way, the tracks being partly in cut and partly in fill, so that the paving of an adjoining street could not enhance its value, that any benefit thereto is merely nominal and it was not assessable for such paving.—*C. B. & Q. R. Co.* v. *Charlton*, 169 N. W. 337.

Reassessments — Equality — Personal Property.—A statute of New York authorizes the tax commission to procure a review of the assessments in a given tax district where it has reason to believe that the assessment roll of the district shows undervaluation and inequalities sufficient to make it inequitable "as between owners of real property." Under this statute, the commission sought to procure a review upon the charge that two corporations who were "owners of real property" were assessed at a lower percentage of the value of their personal property than other "owners of real property." The court held that the statute only authorizes a review in cases where inequality in the assessment of real property is alleged; that to construe it otherwise would involve the court in a very difficult proceeding, in view of the offset of debts in the assessment of personal property, which would make it necessary to enter into an examination of the indebtedness of each taxpayer assessed for personal property; that such a holding should not be made unless the statute clearly authorized it—which they held not to be the case. — *In re Knapp et al. State Tax Commission*, 172 N. Y. Supp. 376.

Express Companies — Due Process—Interstate Commerce. — The United States supreme court has recently upheld an assessment made against an express company which was alleged to be invalid as being a tax upon interstate commerce and made without due process of law. The interesting fact in this case is that the mileage method was used by a state board although there appears to be no machinery for the application of such method. The statutes merely provided for the taxation of the property at its fair value and for the determination of such value at an annual meeting of the county assessors in the case of property which could be more uniformly assessed by such board. We have become accustomed to the view that elaborate statutory provisions are necessary to authorize the assessment on the mileage basis of railroad and similar property. The assessment was sustained by the state court (38 Nev. 505) upon the authority of the Ohio Express cases (165 U. S. 194 and 166 U. S. 185). The supreme court passed upon the federal questions only and held that the tax was in reality upon the property and the fact that the assessors had erroneously entered the assessment as upon the "right to carry express and right to transact all other business" did not invalidate the assessment in view of the fact shown that what was actually assessed was the property tangible and intangible.

The claim of want of due process because the company was not given notice and opportunity to be heard, was rejected on the ground that, even admitting the claim to be true, as the method of enforcing the tax was by a judicial proceeding at which opportunity for a full hearing was given, the requirement of due process is thus fully satisfied (111 U. S. 701; 159 U. S. 526, 537; 183 U. S. 300, 307).

The use of inaccurate data and erroneous standards was asserted as producing a value so excessive as to make the tax a burden on interstate commerce. This claim was also rejected, as it appeared not supported by the record and also because the company was entitled, in the instant suit, to show the true value and have the tax reduced. It attempted such a showing; but the state court upheld the assessment and this holding, upon examination, was held not to disclose ground for condemning the tax as a burden on interstate commerce. — *Wells Fargo & Co.* v. *Nevada*, U. S. Sup. Ct., December 16, 1918.

CAPITAL STOCK TAX — INTANGIBLE PROPERTY IN ANOTHER STATE — DOUBLE TAXATION. — The Pennsylvania supreme court has held that in determining the value of the capital stock of a domestic corporation for the purpose of assessing the capital stock tax, it is proper to consider the value of bank deposits in another state owned by such corporation, and bills receivable for services rendered and goods sold outside the state and payable outside the state; that it is not material that such property may also be taxed by the states in which it may be situated. It is held that even if such property be taxed in other states it does not constitute double taxation in a legal sense; that obnoxious double taxation arises when the double tax is levied upon the same property within the same jurisdiction, citing *Judy* v. *Beckwith*, 15 L. R. A. (N. S.) 143 and note; *Kidd* v. *Alabama*, 188 U. S. 730, and *Hawley* v. *Malden*, 232 U. S. 1. The exemption from taxation granted to manufacturing corporations extends only to so much of their capital stock as is actually employed in manufacturing in the state and the deposits and bills receivable involved here were derived from manufacturing operations and business carried on in other states. — *Commonwealth* v. *Semet-Solvey Co.*, 262 Pa. 234.

INSPECTION FEES — INTERSTATE COMMERCE. — Inspection fees may be lawfully imposed by a state in the exercise of its police power where they tend in a direct and substantial manner to promote the public safety and welfare or to protect the public from frauds and imposition when dealing in articles of general use as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected.

But if such fees are obviously and largely in excess of the cost of inspection, the act will be declared void because constituting in its operation an obstruction to and burden upon that commerce among the states the exclusive regulation of which is committed to Congress by the Constitution.

The determination of the fee is a matter for the discretion of the state legislature which will not be lightly disturbed. Its determination is *prima facie* reasonable and the courts will not enter into any nice calculation as to the difference between cost and collection nor declare the fees excessive unless it plainly appears that they are obviously largely beyond what is needed to pay for the inspection service rendered.

Nor will the United States supreme court consider whether the evidence supports the contention that the inspection provided was not of a character to promote the public safety and protect the community against fraud. The finding of fact by the trial court approved by the state supreme court will be accepted as conclusive.

The above principles were announced in deciding a case involving the validity of fees for the inspection of oils and illuminating products imposed by a Minnesota Statute (Gen. Stat. 1913, Ch. 20; L. 1909, Ch. 502).—*Pure Oil Co.* v. *Minnesota*, U. S. Sup. Ct., December 9, 1918.

FEES OF STATE UTILITY COMMISSION—INTERSTATE COMMERCE—DURESS.—An interesting decision involves the validity of a charge imposed by the state public utility commission of Missouri upon the issuance to a foreign railroad company of a certificate of authority to issue bonds. The state law contains general prohibitions against the issue of such bonds without the authority of the commission, imposes severe penalties for such issue and purports to invalidate the bonds if it takes place. The bonds would be unmarketable if the certificate was refused. The railroad in question applied in all the states through which its line passed for a certificate of authority to issue bonds to the amount of $31,848,900. The Missouri commission granted the authority and charged a fee of $10,962.25. The company accepted the grant but protested against the charge as an unreasonable interference with interstate commerce, paid the fee under protest and applied for a rehearing, which was denied. Upon appeal from a lower court the supreme court of the state upheld the charge (268 Mo. 641).

It was shown that the company's line was upwards of 3,500 miles long, of which about six-tenths of one mile was in Missouri. The property in Missouri was but a small fraction of the total property and the expenditures in the state from the total proceeds of the bonds were less than $125,000. The business of the company in the state was wholly interstate.

Upon these facts the court held it to be plain that the charge which in accordance with the statute was fixed by a percentage of the total issue contemplated, was an unlawful interference with interstate commerce, citing *Looney* v. *Crane & Co.*, 245 U. S. 178, and *International Paper Co.* v. *Mass*, 246 U. S. 135.

The state court attempted to avoid this question by holding that the application was voluntary and that hence the company was estopped to decline to pay the statutory compensation, and it was argued that a decision on this ground excluded the jurisdiction of the federal court. On this point it was held that the late decisions show that this is not the law and that it is the duty of that court to examine the facts and itself determine whether the federal right has been waived (*Creswill* v. *Grand Lodge*, 225 U. S. 246). Were it otherwise, as conduct under duress always involves a choice, it would always be possible for a state to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it and then to declare the acceptance voluntary (*A. T. & S. F. Ry. Co.* v. *O'Connor*, 223 U. S. 280).

Upon the facts, the court is clear that the application for certificate and its acceptance were made under duress. The company was not bound to take the risks of threatened invalidation of the bonds and of penalties being verified. It is always for the interest of a party under duress to choose the lesser of two evils, but the fact of a choice made according to interest does not exclude duress. It is characteristic of duress properly so called (*The Eliza Lines*, 199 U. S. 119, 130, 131). They repeat that even though it appeared that the state court regarded the statute as inapplicable (271 Mo. 258), the company was not bound to take the risk of the decision and no proceeding was pointed out by which it could have avoided evils that made it practically impossible not to comply with the terms of the law.—*Union Pacific R. R. Co.* v. *Missouri*, U. S. Sup. Ct., Dec. 9, 1918.

Licenses on Motor Vehicles—Police Power v. Revenue Power. — A general state law regulating and licensing motor vehicles constitutes a legislative exercise of the police power of the state and supersedes and renders ineffectual any municipal ordinance upon the same subject. In the instant case the municipal ordinance was examined and found to enforce a pecuniary imposition designed to raise revenue as distinguished from a license fee collected on account of necessary police regulation, and thus to be in direct contravention of the provisions of the general highway law and was therefore declared void. — *City of Muskogee* v. *Wilkins*, 172 Pac. 497.

Situs of Intangible Property Held by Trustees.—While as a general rule the domicile of the owner determines the situs of personalty of which he is possessed, such is not the rule where the property is held by others as trustees. A decedent had created a trust in corporation stock, making non-resident trustees, with power to sell the stock or handle it as they saw fit. Upon the death of the testator his executor was assessed for the value of this stock at the residence of testator. The tax was paid and suit was brought to recover the same on the ground that the assessment was illegal and void because the property did not have a taxable situs within the state. The action was sustained.—*Lowry* v. *Los Angeles County*, 175 Pac. 702.

Exemption—Taxation by a State of its Own Bonds. — The constitution of Montana declares that certain property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, shall be exempt from taxation. Plaintiff was assessed for certain state bonds and sought to avoid the tax upon the grounds that they were not property within the meaning of the constitution; that if property, they were exempt on grounds of public policy and that the constitutional provision merely stated general principles and did not compel the taxation of the property enumerated therein. The court examined these questions in detail and pronounced against the contentions made in every particular. It held that the constitutional provision was self-executing and announced the settled policy of the state as to the positive exemptions; that state securities were property and that the power of the state to tax extended to all property, including its own bonds. The constitutional definition of "property" included "moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal and mixed) capable of private

ownership." The comprehensiveness of this definition was held to "defy the ingenuity of the most profound lexicographer" to surpass. No ambiguity was found to exist and no reason advanced requiring that this definition should be restricted as claimed. To the claim that the bonds were the property of the state the court replied by quoting from the decision in *Railroad Company* v. *Pennsylvania*, 15 Wall 300.

On the point of public policy the court holds that no valid reason is suggested for an implied exemption of these bonds; that the owner receives the same protection as the owner of real estate, live stock, money or commercial paper; that one man invests his capital in state bonds as a source of income and profit, another, impelled by the same motive, invests in bonds of a private corporation; both investments are taxed as property and, in consequence, the rate of profit is diminished in each instance; that this is the effect but not the object of taxation, and closes with the wholesome and refreshing suggestion that the purpose of taxation "is not interference with the rights of borrowers or lenders, but to raise the necessary revenue for the support of the government and the consequent security of the people in the possession of their property."—*Cruse* v. *Fischl*, 175 Pac. 878.

Inheritance Taxes — Residence.— The demand for the imposition of inheritance taxes upon those who, while keeping a home in one state where most of their activities are conducted and where their wealth is largely accumulated, yet through a *legal* residence in another state, have escaped taxation in the former, has long been insistent and has often resulted in the passage of unjust and retaliatory laws. In an attempt to meet this demand an amendment to the inheritance tax law of New York was adopted in 1916 (Ch. 551, L. 1916) under which every person is, for the purpose of the act, declared to be "deemed to have died a resident of and not a non-resident of the State of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months preceding his or her death," and a further clause provides that "the burden of proof in a transfer tax proceeding shall be upon those claiming exemption by reason of the alleged non-residence of the deceased." It was claimed on behalf of the state in a recent case that the words "shall be deemed" were conclusive and that the word "deemed" should be construed like "taken as if." In this case it was shown that the decedent actually dwelt in New York 235 days and in New Jersey 130 days during the last year of his life; that during much of that time he was confined to his New York home through illness. It was conceded that he kept his legal residence in New Jersey where he was interested in politics and had extensive business interests and that he did not intend to change his residence. The appellate court, reversing the surrogate, has just held that the statute in question merely creates a disputable presumption which can be overcome by sufficient evidence to the contrary; that, under the rule contended for, the estate of a resident of California might be taxed in New York because decedent was compelled to lodge there while on a business errand; that other states might tax his estate "by the enactment of laws no more ridiculous"; that the legislature did not intend to impose any such drastic rule; if it did, it might as well have named a month or a single day as sufficient lodging in the state to subject the estate to the tax, and that when the statute provides that "residence shall be deemed to exist and the fact is that it does not exist, the statute does not make the fact other than it is."

There has always been doubt expressed as to the validity of this statute which has thus been declared ineffective to accomplish the desired purpose. An appeal will, it is said, be taken. — *Matter of Transfer upon the Estate of William Barbour*, N. Y. L. J., December 28, 1918.

Inheritance Tax — Deduction of Mortgage Indebtedness. — The surrogate's court of New York County has held that in determining the value of the personalty of a resident decedent, it is improper to deduct indebtedness represented by a mortgage of real property situated in another state. The said real estate is to be valued in the form decedent left it and the mortgage indebtedness may not be deducted upon the theory that the real estate is to go to the devisee free of such indebtedness. The testator specifically devised real estate

to his wife which was, at his death, encumbered by a mortgage. His interest was the equity of redemption, and this was the measure of the value of the devise.—*In re Vanderbilt's Estate*, 172 N. Y. S. 62.

Inheritance Tax—Competition for Jurisdiction. — A resident of Iowa died testate leaving an estate consisting of promissory notes which had been in the possession of a resident of Minnesota for some years prior to the death of decedent. This Minnesota resident filed the will for probate in that state. Alleging a conspiracy to defraud the state of Iowa from taxes which it might assess against the estate, the state treasurer asked leave to file an original bill of complaint in the United States supreme court to obtain a decree which would have the effect of restraining further proceedings to probate the will in Minnesota and would secure the administration of the estate in Iowa. Various grounds of objection were set up by defendants but the court rested its decision on but one. It held that, regardless of the domicile of decedent, the notes and bonds were subject to probate proceedings in Minnesota and likewise subject to inheritance taxes there (Minn. G. S. 1913, §§ 2281, 7205, 2271; *Bristol* v. *Washington Co.*, 177 U. S. 133; *Wheeler* v. *New York*, 233 U. S. 434); that the State of Minnesota had full power to distribute the property located there and the State of Iowa was not entitled to enjoin the proceedings which was the only effective relief sought.—*Iowa* v. *Slimmer*, U. S. Sup. Ct., December 9, 1918.

RECENT PUBLICATIONS

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Haig, Robert Murray. Taxation in the urban principalities of Saskatchewan. A Report to the Government of the Province of Saskatchewan. 48 p. Regina, 1917. To be reviewed.

Kansas. Sixth biennial report of the tax commission, for the period between October 16, 1916, and October 15, 1918. 398 p. Topeka, 1918.

This is the biennial report of the official proceedings and of the work accomplished by the Kansas tax commission.

Lennard, R. The Taxation of Luxury. *Economic Journal*, vol. XXVIII, p. 287. September, 1918.

A comparison of the efforts at the taxation of luxuries in various European countries, with a summary of the administrative and other difficulties that have been met. In general the taxation of luxuries is objectionable, although much is to be said for the use of repressive taxes upon a few important luxuries, with the selection limited to those luxuries which (a) absorb productive resources which might serve more useful purposes and (b) are susceptible of graduated taxation.

Meech, H. Wm. Municipal assessments and taxation in Alberta. *Western Municipal News*, Dec., 1918, p. 331-334.

Mitchell, A. A. A levy on capital. *Economic Journal*, vol. XXVIII, p. 268. September, 1918.

This article is a reply to the series of three articles on the same subject in the June, 1918, number of the *Economic Journal* (cf. The Bulletin, October, 1918). The author holds that it is possible to take a comparatively large proportion of the national income through taxation without seriously affecting the standard of living or checking energy and effort, and that such a program offers fewer disadvantages than the levy on capital.

Missouri. First biennial report of the state tax commission, for the years 1917 and 1918. 261 p. Jefferson City, 1918.

This report, the greater part of which was written by the chairman of the commission, discusses a variety of matters which have come within the scope of the commission's activities during the biennial term. The task of gearing up the tax administrative machinery has not been particularly easy in Missouri, and the commission's lot has not been altogether enviable. The preliminary work of educating the people to the importance of effective tax administration has been well begun, and the sensible discussion of various problems in the present report will assist in the development of public opinion. The commission has had an experience with the State Board of Equalization similar to that encountered by some other tax commissions, in having its carefully prepared figures of equalization and corporate assessment arbitrarily reduced. The commission has recommended an equalized assessment of general property totaling $4,017,980,000, and the board of equalization reduced this to

$1,898,000,000. The commission's assessment of corporate property, amounting to $477,748,000, was cut to $204,832,000. Very clearly, the state board of equalization in Missouri is a serious obstacle to the best results in tax administration. We are gratified to find that the report of our model tax system committee is presented in full in this report.

SOUTH DAKOTA. Third biennial report of the tax commission. 112 p. Pierre, 1918. (With an insert map showing average assessed and equalized values of farm lands, by counties.)

The results of the six years show commendable improvement in the basis of assessment of property and in the development of improved tax legislation.

SCOTT, PROF. W. R. Some aspects of the proposed capital levy. *Economic Journal*, vol. XXVIII, p. 247. September, 1918.

The effects of such a method of debt redemption upon governmental expenditure are considered. The argument is advanced that repayment by a capital levy would encourage governmental extravagance in the future, because it would remove the check of a continuing high rate of taxation.

VERMONT. Commissioner of Taxes. Partnership registration bulletin for 1918. 173 p. Northfield, 1918.

Illustrative of the heterogeneous duties imposed upon tax officals in some states.

YOUNG, A. N. Finances of the Federal District of Mexico. 71 p. Mexico, D. F. 1918. To be reviewed.

ZANGERLE, J. A. Rules and principles with land and building values controlling the 1917 "Community Assessment" of Cuyahoga County. 72 p. $3.00. Cleveland, 1918. Contains a series of maps showing the unit values established for the assessment of real estate, and a summary of the principles used in valuing structures.

ZANGERLE, J. A. Shall we classify property for taxation? 46 p. Cleveland, 1918. A statement of the case for and against the classification amendment submitted in Ohio in 1918.

THE NATIONAL TAX ASSOCIATION

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

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DEATH OF JUDGE HART

The news of the sudden death by accident of Judge John C. Hart, Tax Commissioner of Georgia, a member of the Executive Committee, will be deeply regretted by those who were privileged to enjoy his personal acquaintance. His dignified and gracious bearing will be remembered by those who were in attendance at the Atlanta conference. The office of tax commissioner was accepted by him at great personal sacrifice and as a matter of duty, and his kindly and considerate qualities had already resulted in substantial improvement in local tax administration.

RESIGNATION OF PROFESSOR FAIRCHILD

It is difficult to adequately convey to members the regret felt by the officers in announcing the resignation of Professor Fairchild as Secretary of the Association and Editor of the BULLETIN. He accepted the duties with reluctance and only from a keen sense of devotion to the aims and purposes of the Association and the cause of true tax reform. Only those directly associated with him are aware of the definite personal sacrifices which the work entailed and of the painstaking manner with which it has been conducted. He has felt for some time, as his professional duties have become more exacting, that he should be relieved, but good-naturedly succumbed to the insistence of the officers that he continue. Recently, however, college duties became so greatly increased that the officers have been forced to accede to his wishes.

The matter of a permanent successor could not well be adequately considered at the moment, while the purpose to convey in some slight degree the appreciation of Professor Fairchild's services to the Association, required immediate action. To meet this situation, Mr. Holcomb, the Treasurer, has consented to carry on the work temporarily and until other arrangements can be made. He accepts the duties reluctantly and with misgivings as to his ability to live up to the high standards set by his predecessors, Dr. Adams and Professor Fairchild. He relies upon the cooperation of the members in the confident hope that thus the BULLETIN may be maintained as a useful instrumentality in forwarding the aims and purposes of the Association.

THE RELATION OF THE NATIONAL SAVINGS CAMPAIGN TO NATIONAL AND LOCAL FINANCE

ROY G. BLAKEY

Economics Department, University of Minnesota

[The war has greatly increased the needs of the federal government for funds. Federal, state, and local governments, as well as business enterprises, have to be financed from one common fund —the national income. Anything which helps to increase the efficient use of this common fund, or to increase its size, is of concern to all who have to draw upon it. The National Savings Campaign, especially under the leadership of the newly organized Savings Division, should result in securing much benefit, not only to the federal government, but to the state and local governments, as well as to business undertakings. Hence, the members of the National Tax Association may well encourage this movement, both officially and individually.—EDITOR.]

The fiscal problems, not only of the national government, but also of the state and local governments, have been rendered much more difficult than formerly by the war. For many years prior to the beginning of this conflict the fiscal needs of the federal government were small indeed as compared with the combined needs of the state and local governments. But from now on the needs of the federal government also will be heavy. In fact, the annual interest on the national debt, as it will stand at the close of this fiscal year, will be as great as the entire federal expenditures prior to the war, that is, approximately a billion dollars. The expenses of all departments of the federal government have increased enormously and will never get back to the pre-war basis. It seems unlikely that the combined requirements for interest and so-called ordinary expenses will soon be less than three or four billion dollars annually.

If we have a national debt of approximately twenty-five billions, it will take the greater part of a generation to pay it off at the rate of one billion per year. Many favor paying it much more rapidly than this. If we add this or a greater sum to the three or four billions mentioned above, it is evident that the federal taxes will be a considerable drain upon the national income. Each billion dollars means an average of nearly ten dollars per capita for every man, woman and child in the United States, or forty-five dollars per family. That is, four billion dollars would mean an average of about forty dollars per capita or one hundred and eighty dollars per family, for federal purposes alone.

For several years before the war many states, and especially many municipalities, were worrying over their increases in expenditures and trying to find new sources of revenue to meet them. These increases had been brought about partly by rising prices and partly by the fact that governments had been undertaking many new functions. The war has resulted in increasing expenditures which states and municipalities have had to make even much more rapidly than they had increased before and, furthermore, as mentioned above, it has made the federal government, whose needs were formerly comparatively small, a great competitor for the national income.

Although there has been an almost complete separation of sources of revenue for federal and local purposes, nevertheless all expenditures must be met out of this national income. The more the individual or the nation gives up for federal expenditures the less there is left to devote to state and local purposes, including private as well as public purposes. The national government does not have to adopt a property tax similar to the local property tax in order to make it more difficult for the localities to secure revenue through property taxes. In the last analysis all taxes are paid out of capital or income. In fact, nearly all of them are paid out of income, but any that are paid out of capital reduce income as much or more than they would if paid out of income. The state and local governments are not unconcerned when the federal government adopts an inheritance tax, as has been evidenced by the many vigorous protests which have been made against federal inheritance taxation and proposed taxation in the recent and remote past, as well as in the present. Neither are they unconcerned when the federal govern-

ment adopts any other kind of taxes which draw heavily upon the national income whether the federal levy takes the form of a tax upon income, imports, liquor, tobacco, freights or other things.

But whatever may be said about the effect of most federal fiscal measures upon the problems of state and local finance, there is at least one development born of the war which the officials of all ranks of government can well afford to look upon with favor: in fact, which they may well encourage. This is the thrift movement which the United States Treasury Department has recently announced that it hopes to make a permanent and increasing source of national income. Such a movement should not only furnish funds for the federal government but should result also in a substantial increase of the national dividend out of which all financing, whether public or private, must be done.

In the latter part of 1917, Mr. Vanderlip took up for the Treasury Department the leadership of the War Savings campaign. He not only realized the immense needs occasioned by the war but he saw also what so many of his associates did not see, namely, that we could not continue business as usual. Furthermore, not only he but others in the Treasury Department realized that if inflation was not to become excessive, everything possible must be done to finance the war out of actual savings rather than by an unnecessary expansion of bank credit. The active co-operation of thousands of voluntary agents throughout the country and the strong appeal to the patriotism of the buyers added to the almost intimidating pressure of public opinion, enabled the Treasury to sell about a billion dollars worth of War Savings Stamps in 1918.

A campaign in times of peace must depend largely upon other than war motives and methods. In order to put the savings movement upon a permanent basis, there was organized in the latter part of 1918 the Savings Division of the War Loan Organization, whose main function, aside from that of co-operating with the district and local organizations in securing funds for the Treasury in 1919, is that of taking the leadership in a national educational campaign which will make thrift a national habit. Its aim is to substitute for the war appeal and the strong pressure of public opinion the real and general conviction that saving stamps are desirable purchases, so that they will be eagerly and generally bought by the people rather than forcibly sold by persistent agents. This movement should result in a large addition to the national income through the saving of much that would otherwise be wasted, and should secure also the many benefits which accrue to the individuals, communities, and nations that are thrifty.

Perhaps Americans have been rather harshly criticized for their lack of thrift. As a matter of fact even before the war they saved more than any European nation, though in making this comparison we should consider the size and especially the resources of the United States. The latter have been so abundant that we have not only saved more but we have also wasted more than any other country. In fact, the waste has been the direct result of our great abundance. We haven't saved more because we haven't had to. Individuals, corporations, municipalities, states and the nation have been reckless in their extravagance, have spent money for many foolish things, and have incurred obligations without any real examination of the needs. Many cities have approximated their debt limits and hardly know how to provide for the needs of the coming years. Many have complained of extravagance but few have actually practiced thrift. There is no greater need at the present time than a nation-wide thrift campaign, a campaign which will reach every citizen of the United States and which will have its effect upon public opinion and upon every private, corporate and government enterprise in the country.

In its essence saving does not mean so much doing without as it means planning—a budget-making, so to speak—making a survey of all needs and of all means and allotting the means to the needs in such a way as to meet all the important ones. Private and public needs are so great that it is absolutely impossible to meet all of them. Hence, it is important that planning shall be done in order that only the lesser wants rather than more important wants shall be sacrificed. To put it in other words, a campaign for saving is really a campaign for wise spending.

A large part of the members of the National Tax Association are state and local

tax officials. Many of them are especially interested in tax-getting, but they, as well as all other taxpayers, will also doubtless be interested in, and able to give both individual and official encouragement to a campaign which will tend to increase the common fund upon which all must depend, and at the same time promote a saner and sounder public opinion as regards matters of public and private finance.

THE CANADIAN BUSINESS PROFITS AND INCOME WAR TAX ACTS

R. W. BREADNER
Commissioner of Taxation, Ottawa

From an address delivered at the Annual Convention of the Dominion Association of Chartered Accountants, Montreal, September 19, 1918

II. THE INCOME WAR TAX ACT, 1917

This, in my opinion, will be a permanent act as long as we are alive, although I am also of the opinion that the revenue derived therefrom may not reach the amount that some of our newspaper friends estimate, based on the wealth of the country.

In furnishing returns under this act, gross income must be shown in all cases, and particulars furnished of deductions claimed. Subject to the taxpayer's right of appeal, the officers administering the act are the judges of what are proper deductions from gross income, and the taxpayer will not be excused from liability for omission; it is absolutely necessary that the taxpayer should take the department into his confidence, place his cards on the table and let the department decide, and I think the reputation that the department has in connection with the business profits war tax act will be maintained in the administration of the income war tax act. In a taxpayer's gross income should be reported every item of income derived from any source whatever, actually received or accrued, due in the calendar year for which the return is made, whether received in cash or the equivalent of cash.

Allowance will be made for amounts received during the year but actually earned prior to January 1, 1917. That will not apply to any year in the future, but the act has to have some starting point, therefore the department holds that the income taxable is that which properly accrued since December 31, 1916.

The department has also ruled that companies that had their accounting period ending between January 1, 1917, and June 30, 1917, need not file returns for 1917, and that companies having accounting periods ending after June 30 should file returns for 1917 period.

Bonuses paid to employees are income of the calendar year in which they are received, without regard to any fiscal year or other period in respect of which they may have been earned or paid. All persons in receipt of free rent, or board, or similar perquisites shall add to the amount of their income for taxable purposes the reasonable value thereof, because the act provides that personal and living expenses shall not be taken as a deduction.

The farmer is required to add to his net income the value of the goods that he and his family have consumed. And I want to say here that there have been hundreds of assessments made against farmers. The other day an assessment of nearly $5,000 was made in respect of 1917 income against a farmer.

Preferred dividends are not a proper deduction from the income of a corporation. Stock dividends stand in the same position as cash dividends for the purpose of the tax.

The income received from Canadian industrial bonds, even though expressed to be issued taxfree, will be considered income subject to taxation. Royalties paid to a proprietor by those allowed to develop or use property is to be accounted for as income. No deduction can be allowed from the income of the Canadian branch of a foreign company in respect to tax paid thereon to the foreign government. Taxes paid by persons resident in Canada to foreign governments in respect of income aris-

ing within the jurisdiction of the foreign government may be deducted in determining taxable income. Except where the buying and selling of securities is the main occupation of the taxpayer, profits or losses on stock transactions must not be taken into consideration in determining taxable income, neither should losses sustained through endorsing notes. Profits or losses of real estate corporations on sales prior to the commencement of the 1917 accounting period will not be taken into account for income tax purposes. Contingent reserves set aside to provide against possible future losses are not a proper deduction from income. Money advanced by a mortgagee for protection of his security is a proper deduction from mortgage interest income, and when repaid will be taxable income for the year in which it is repaid, in addition to the interest received on the mortgage. Annual life insurance premiums paid by a corporation for insurance on the life of its officers cannot be deducted as a business expense.

Depreciation consists of a reasonable allowance for the wear and tear of property arising out of its use or employment, the amount allowed will be the amount of the loss occurring during the year to which the returns relate, estimated on the cost and the estimated lifetime of the property with respect to which such deduction is claimed.

There are many other points, but I think it well if I close my remarks here and allow you gentlemen to ask questions concerning points which have not been made clear.

Q.—If the profit and loss account of a company determines the profits quarterly, can these quarterly profits be added to capital for the purpose of claiming an exemption as an offset to the reduction caused by payment of the dividend?

A.—No, that would be contrary to the provisions of the act.

Q. — Is a stock dividend declared and paid out of surplus (created out of profits of years previous to the income tax legislation) subject to individual income tax? That is, will the individual have to pay income tax on this stock dividend?

A.—No.

Q.—With reference to the ruling that in the computation of capital, goodwill is not allowed except in so far as it can be proved to be represented by actual cash expenditure, and in view of the fact that the principal asset of a trade paper publishing company is its goodwill, it is represented that to strike out goodwill would be unfair. Where the property has always been in the hands of one company it might be fair to take the loss which such companies invariably make in the early years as actual expenditure on goodwill, but where the property has changed hands several times, as often happens, it may be impossible to ascertain the exact aggregate of such expenditure.

A.—The viewpoint of the department is that goodwill cannot be treated as an asset. If it were so treated, every company would have a right to it. Therefore unless special circumstances warrant a departure from that rule, goodwill cannot be regarded as an asset. There may be cases where goodwill is represented by actual cash expenditure for which there is no asset; in such cases it would be fair to consider what proportion of the asset claimed to be goodwill is represented by that cash expenditure. Each such case would have to be treated on its merits, but the general rule is that goodwill cannot be treated as an asset, because it is nothing more than watered stock, and I do not think there is anyone who considers that any value should be placed on watered stock.

Q. — We understand the principle, but this is a general class of business which it is submitted is an exception, and that it would be a distinct hardship if good will was not allowed as an asset in their case. Such publications could not be acquired in the market at anything like the value of their physical assets only.

A. — That is true in regard to publications owned by a company, but the same treatment would have to be accorded to those owned by a private party or partnership; the mere fact of being incorporated as a company should not allow that company to set up one or two hundred thousand dollars of goodwill, and the partnership nothing.

Q. — An industrial company holds real estate, and sells for cash a part of its land not required for its business. Many companies in British Columbia are like this. The company declares a dividend out of this special profit in real estate. This dividend I claim is not subject to tax, but

how does it affect the shareholders liable to the supertax?

A. — The receipt of that dividend by a shareholder would be a return of capital largely; it is only actual income that would be taxable. The act provides that there shall be an allowance made for depletion of mines, etc. The same principle has to be extended to timber limits, and the depletion of real estate, etc. It is a question of fact what proportion of that is income and what proportion return of capital.

Q. — A large company holds a big line of war bonds and declares a stock dividend out of the interest received thereon by buying and distributing further war bonds. It is presumed that this dividend is not subject to income tax.

A.—If the bonds have been issued by the Dominion government taxfree, the department cannot tax the income derived from them, whether paid in cash, or stock dividend, or however paid.

Q. — In case of a concern selling their product on long deferred payments, such as a retail piano business, is it your ruling that the taxable profits consist of the surplus added as a result of the sales during the accounting period, or of the realized profits actually received, whether the sales were made during that period or in earlier years?

A. — It is the profit made during the accounting period that is taxable. A merchant engaged in that business should set aside a reasonable reserve for bad debts, and it is net profits that are taxable.

Q.—I happen to know that your ruling is different from that of the United States government.

A.—We are not guided by that.

Q.—In the case of the piano dealer who has the sale notes on his books, and who wisely makes provision for the losses he may sustain on the notes taken that year; is that a provision for future losses?

A. — That is a current loss; it is the amount applying to that period. The income tax act came into force January 1, 1917. All accounts receivable on the books of the taxpayer at that date are capital. Now we only want to tax the income that has properly accrued for the 1917 accounting period, the net profits for that period are what is taxable, and against the sales of that period they should set aside sufficient reserve to meet the bad debts of that period.

Q.—Certain legislation was enacted by which certain industries were practically ruled out of business, such as the distilleries and the breweries: how would you propose to deal with the depreciation down to the vanishing point of the investment in those industries?

A. — I wish to say that conditions that prevail, say in British Columbia, are entirely different from conditions in Quebec, where the breweries are still doing business. The act provides that the profits made during each and every accounting period shall be taxable. Each accounting period must be taken by itself. But I can understand a brewer, or even a merchant engaged in the wine and spirit business, having a great many accounts on his books which would have been perfectly good if the business had continued, but which as a result of the prohibition legislation have become worthless. In the adjustment of the assessment those worthless accounts must be considered.

Q.—But as to land, buildings and plant?

A.—The plant has to be depreciated by a reasonable amount; there is a certain residual value. That is a question of fact in each case; one cannot make a general rule.

Q.—Have you in mind in that connection the depreciation allowed persons who created works for the manufacture of munitions of war, where the government allowed such a price for the product as would enable them to write off the whole plant, besides a reasonable profit?

A. — Well, that arrangement was made by the imperial munitions board, not by the Dominion government. According to rumor, they had two classes of contracts: one was at a certain price which included the cost of installing the machinery; the other did not.

Q. — A partnership is subject to both normal and supertax; a company is not; and in the discussion before the House it was stated that you propose to equalize that by taxing the man who receives the dividend. How do you propose to overcome the possibility whereby under that state of things the company can undersell a partnership to the extent of the difference?

A.—The question you raise is one with respect to legislation; I am only dealing with the administration of the act. But I would point out that to a certain extent

that has been remedied; that in respect to the accounting periods of 1918 and thereafter the tax paid by the corporation will be 6 per cent instead of 4 per cent. Four per cent is the normal tax, and the shareholder will only receive credit to that extent, not for 6 per cent; so there is a difference of 2 per cent.

Q. — A lumber concern with a large plant, whose share capital is, say $100,000, with a bond liability of $75,000, secured by a mortgage on all their property except lumber and stock in trade, and with a large loan liability unsecured, bought, a few years ago, a portable mill for $50,000, used in the course of their business, and of course it came under this mortgage. They have since sold this mill for, say $150,000, which amount was appropriated to the liquidation of the unsecured loan. No depreciation has been charged against profit and loss for any of the years on fixed plant and machinery, and no dividends ever paid. Would this apparent profit of $100,000 be taxable?

A.—If the total assets were sold outright, that is a sale of capital, it is not profits from operation. It is the sale of a capital asset.

Q. — Suppose the sale of capital assets produces a large profit, is that taxable?

A. — The profits taxable are profits earned in the operation of the business.

Q.—Suppose someone bought a boat for $50,000 and sold it for $200,000, is that profit taxable?

A.—Unless the business of the person is buying and selling boats, no. And that is in accordance with the decision of the privy council in Great Britain. Take, for instance, the Hudson Bay Co.: they have a large area of land; they are selling it. The decision of the privy council is that they are a trading company and the profits made in respect of that land is not income for income tax purposes in Great Britain; it is the return of capital.

[CONCLUDED]

THE TAXATION OF INCOMES UNDER THE NEW HAMPSHIRE CONSTITUTION

A NEW SOURCE OF REVENUE

Address of Albert O. Brown, Chairman of the State Tax Commission, at the Annual Conference of the Association of New Hampshire Assessors at Manchester, December 18, 1918

Under the New Hampshire constitution no property is taxable unless designated as such by the legislature, but all so designated is assessed proportionally—that is, at the same rate in the same taxing district. The legislature having acted in the premises, all property is now divided into two classes, one in which equal values are taxed equally and one in which values however great are not taxed at all.

The act of 1772 added "all stock, whether money in hand or at interest, more than the owner gives interest for," to the classes of property previously made subject to taxation. This ancient statute well expresses the present law controlling the taxation of intangibles. "Money on hand," as several revisions have made the statute now to read, is held to include money on deposit elsewhere than in savings banks and "money at interest" to embrace that represented by bonds, notes, accounts and all other interest-bearing obligations whether reduced to writing or not. Receivables without interest are not taxable.

The severity of the law is greatly lessened by the right to offset debits against money and credits. Shrewd men see to it that on the first day of April they are paying interest on a sum sufficiently large to balance their cash and interest-bearing receivables.

Nevertheless the law has operated to discourage investments in bonds during the century and a half of its existence, and especially for the last half-dozen years during which the sworn inventory requirements have been rigidly enforced. Much money belonging to trusts and to women that would naturally be found in underlying securities, has been put into the preferred shares of the railroads and great industrial corporations. This would not be altogether unfortunate if it were all, but it

is not all. Large sums have gone into stocks preferred in name only and into common shares of little value. Many people have become the victims of promoters and of local and traveling salesmen. These movements will be the better understood if it is remembered that in this state corporate stocks are constitutionally tax free.

To encourage agriculture the legislature of 1911 exempted from taxation money loaned at a rate of interest not exceeding 5 per cent and secured by note and mortgage on real estate situated in New Hampshire. To aid the public credit the legislature of 1913 exempted New Hampshire state, county and municipal bonds bearing interest at a rate not exceeding 5 per cent. But the volume of securities affected by these two acts is not sufficient to change the general situation.

The entire omission or exemption of the bonds of privately owned corporations which to a greater extent than any other security represent money at interest, although within the power of the legislature, has found no favor with that body. Their classification, though beyond the power of the legislature, has been the subject of much discussion by the people and of occasional consideration by constitutional conventions. The friends of classification in the convention of 1912 procured the submission of an amendment empowering the legislature "to specially assess, rate and tax growing wood and timber and money at interest," and to tax incomes from the stock of foreign corporations and money at interest and to graduate the tax. But the coalition of lumber men and bond-holders failed and the joint amendment was rejected at the polls by a few votes.

It is doubtful if anything has yet been lost by the defeat of the amendment. It is believed that to the present time the faith of the New Hampshire legislator in the fairness and adequacy of the general property tax has remained unshaken even in the face of much argument and many figures. Had the amendment been ratified he probably would not yet have invoked its authority.

This paper now turns from the beaten paths of taxation into ways that were untrodden prior to about four years ago. Governor Spaulding in his message to the legislature of 1915 said, "I recommend that intangibles now taxed, be exempted from taxation, but that the revenue from all intangibles, including stocks, be taxed at the rate applied to all other property."

He supported this recommendation with the statements (1) that the tax on bonds and mortgages often took more than half the income, falling most heavily on widows and trustees, (2) that the proposed tax would increase our revenues, and (3) that it would induce citizens of other states to come to us to live. The first and third arguments lost their strength when the supply of liberty bonds free of local taxes became plentiful. The second is as valid as ever and will be more so as the need of additional revenue develops.

In pursuance of this recommendation a bill providing that personal estate liable to be taxed, should include money received during the year preceding the first day of April as dividends upon shares and as interest upon money loaned, whether represented by bonds or otherwise, was framed, introduced and referred to the appropriate committee. It necessarily exempted the securities themselves that produced the income to be taxed.

An opinion of the justices of the supreme court to the effect that the proposed law was within the power of the legislature and if enacted would be valid, was obtained.[1] Public hearings were had. Professor Bullock came to Concord and said much in favor of a change in the method of taxation of intangibles but very little in favor of the pending bill except that it was a step in the right direction, a beginning, so to speak.

Then was witnessed one of the most curious of spectacles. The lion and the lamb did not lie down together, but they stood up together and fought the common enemy side by side. The capitalist, who wanted securities taxed little and the farmer who wanted them taxed much, advanced with equal steps to the attack. The bill was defeated.

Out of the agitation, however, came a call for a constitutional convention. Such a convention assembled in June last, and after a session of three days adjourned to be reassembled after the war, probably in the winter of 1919-1920.

There is pending before the convention a resolution to submit to the people for

[1] *In re Opinion of Justices*, 93 Atl. 311.

ratification an income tax amendment. If this resolution is adopted and the amendment is ratified as well as submitted, an entirely new source of revenue will be available in the shape not only of dividends on stocks and interest on bonds and other credits but also of returns from all kinds of business and from personal effort. The resolution may be too wide but it is well directed, and if properly amended, will command much support.

This is a period of growth and enlargement in public expenditures. The pressure of the federal government, induced by the war, has, it is true, repressed some local activities. But when the pressure is removed, these activities will expand into greater volume with greater requirements. Moreover, the inflation of the war, and, it may be added, its extravagance and waste, will extend their influence to state and municipal outlays. Already there is seen an oncoming and ever-rising wave of taxation that threatens to overwhelm us. It is apparent in this year's unprecedented increase of $814,000 in our local assessments alone. It is observed in additional state expenditures, amounting to a very large sum, and not yet reflected in taxation.

How is the new demand for revenue to be met? It may be said it can be averted. This is in a great measure true, but it is equally true that it will not be averted. The farmers control probably 200 out of the 224 towns in the state. If their taxes threaten to be excessive they can vote down the appropriations. Manufacturers and merchants, using the terms in the broadest sense, are charged with the management of the remaining towns and all the cities. If their taxes are too high it is their own fault. The fact is, however, that the people directly and through their representatives, will continue to vote larger and larger sums for public charges, and will then grumble about their taxes as they have done from time immemorial. And the question as to how the demand for more revenue is to be met must be repeated.

Tangible property, from which the most of our revenue is derived, can stand something more in the way of assessment without confiscation, but we are nearing the limit of endurance. It is imperative, therefore, that additional subjects for taxation should be found.

It has already appeared that the constitutional convention of 1912, and Governor Spaulding three years later, turned to intangibles for relief. Unquestionably here is a great reservoir of untaxed and partly taxed wealth. It will be tapped whenever the demand for more revenue becomes sufficiently insistent, and it is right that it should be tapped.

Those who possess intangibles, whether with or without other property, are able to hold them only because of the protection afforded by the state. The courts are open to these persons and the police are at their service. They are entitled to attend and to send their children to the public schools. The streets, sewers, sidewalks and lights are for their use. And in case they come to want they are entitled to support at the public expense. In return they surely ought to contribute something on account of their intangible wealth to maintain the government from which all these benefits are derived. On the other hand, they cannot be expected to pay a full tax for the owners of the property represented by their paper certificates and promises.

It is entirely feasible from a practical point of view, to classify stocks and credits for direct taxation at a rate commensurate with their ability to pay. This has been done in several jurisdictions and a flat tax of about four mills on the dollar has been found to afford a large return and to be otherwise satisfactory. The same practical result may be reached, however, by resorting to shares and money at interest indirectly through their income. And a tax on incomes has some advantages that classification as heretofore proposed in this state, does not possess. It may be made to apply to returns from business and personal earnings as well as from intangibles. On this principle a law has been enacted in Massachusetts which is said to be eminently successful.

Probably no authority for classification or for an income tax in the technical sense of the word can be found in our organic law. These devices were beyond the need and the philosophy of the fathers. Consequently they are not within the provisions of the great compact the fathers formulated. If they are to be legalized it must be under an amendment.

If the constitutional convention now in recess, shall submit and the people ratify a reasonable income tax amendment we shall

be prepared for an emergency that seems to be close at hand. But if such an amendment fails, either in the convention or at the polls what is the situation?

There is no method of amending the constitution except through a convention. It is provided in the instrument itself that at the expiration of every seven years the sense of the people shall be taken upon the subject of revising the constitution. Yet but seven conventions have assembled in pursuance of this provision in the history of the state, an average of one in 19 years. Moreover, a period of four years must necessarily intervene between the initial vote of the legislature looking toward a convention and the approval of any statute enacted under any amendment submitted by that convention. Therefore it might be that the people could not well wait for the operation of machinery the speed of which they are unable to accelerate. In such circumstances can there be any possible relief?

It is believed a more or less satisfactory enactment in the nature of an income tax law can be supported under the constitution as it is. The money derived from dividends and coupons is, according to the law of this state, property upon which a tax may be assessed. The same thing is doubtless true of incomes from other sources. The rate would need to be that imposed upon other property in the same taxing district, and the assessment would in reality be a property tax and not an income tax. But the terminology of taxation is relatively unimportant.

There are now 246 taxing districts in New Hampshire. They are made up of the state, the ten counties, the eleven cities and the 224 towns. A separate and distinct tax is assessed in each of these districts pursuant to a method that has come down to us from colonial times and has received the approval of 130 years of government under the constitution. The rate in the several districts varies according to the size of the inventories returned and the amount of money to be raised. It is conceivable that if regard were had to fractions and there were more latitude as to overlay there might this very year be as many different rates as there are taxing districts. As it is, we have many coincidences, but there were nevertheless at the last assessment 114 different rates in New Hampshire. Waterville with a rate of 28 cents on the $100 is at one end of the scale and Jefferson with a rate of $3.30 at the other. Yet the taxes made by the use of these two rates, each in its own town of course, may be reasonable and proportional within the meaning of the constitution.

The taxation of polls and of inheritances has no place in this discussion. It rests in each case upon independent authority and is not affected by the rule of proportion. That rule has been held, however, as appears above, to apply to taxes on income as well as to taxes on other property. But the necessity of applying to income, if a proper return is to be had therefrom, a higher rate than other property can bear, prevents the taxation of both classes at the same time in the same district.

At present the corpus or principal of property bears the entire tax burden to the exclusion of income. But so far as the constitution is concerned, the situation might be reversed. We might if we desired, discontinue the tax on all property except income and resort to that alone for the full support of government. The change would involve merely the substitution of income for the property now taxed, as the subject of taxation. The machinery now in use and the methods now employed, would have to be changed but little if at all. Moreover, any classes of income could be omitted or exempted from all taxation as certain classes of other property now are. There would, of course, in every district be a tremendous decline in the valuation returned and a corresponding increase in the rate imposed.

This scheme of substitution, though perfectly constitutional, is thought to be impracticable in the cities and towns because of the difficulty of segregating enough income to bear at any reasonable rate the whole burden of taxation. It will, therefore, receive no further attention in this paper.

In the district of the state, conditions are different. The revenue required is relatively much less than in the municipalities. It amounts on the basis of recent years, to about two millions of dollars annually. Of this sum about $700,000 is received from fees, licenses, excises, inheritances and other sources independent of property taxes. Approximately $750,000 is supplied by the direct state tax, a property tax assessed and

collected for the state by the cities and towns. The balance of $550,000 is derived from the railroads and certain other public service companies which the state itself assesses and a part of whose taxes in the case of the railroads and the whole of whose taxes in the case of the other companies, it retains for its own use. These are also property taxes.

As most of these public service companies extend into several and some of them into all of the counties, it is believed their taxes might be assessed by or for the benefit of the counties as they are now assessed by and for the benefit of the state. The revenue from this source would meet fully 75 per cent of all county requirements. Therefore the direct county tax, which might need to be retained, would shrink to small proportions and become comparatively unimportant.

Now by forgoing the direct state tax and relinquishing to the counties all right to the public service taxes now received and retained by it, the state would divest itself of all property taxes whatsoever, and of course of all rates of taxation. There would be a consequent loss of revenue represented by the sum of the direct state tax and the relinquished public service taxes amounting to about $1,300,000. This could easily be made good by imposing a new state property tax on the income from intangibles at an adequate though uniform rate. As there would then be but one rate of taxation there could be no lack of proportion.

For the purposes of argument the estimate of well-informed men that there are in New Hampshire $500,000,000 in stocks, bonds and interest-bearing credits, may be accepted. This includes the $120,000,000 owned by the savings banks but excludes national bank stock, bonds the state has no power to tax and the holdings of corporations whose property is exempted by law. Now if the average rate of return from these shares and obligations is as much as six per cent, as is probable, because of the great preponderance of stocks, the annual income is $30,000,000. It is plain that a tax of 6½ per cent on this sum would yield $1,950,000. This added to the $700,000 derived from fees, licenses and the like, should supply the state with all the revenue needed in any peaceful year for a very long period of time.

But it may be said that $500,000,000 is too large an estimate. This is very likely true. It may not seem so, however, to those who reflect that in the last year and a half the people of this state have paid out $75,000,000 of cash for liberty bonds and thrift stamps and other millions for war work, without depleting their bank accounts perceptibly or scratching the surface of their intangible investments. From the first year's operation of the income tax law in Massachusetts it appears that there are $3,500,000,000 of intangibles in that Commonwealth, and this vast sum does not include the huge volume of securities that are not within the purview of the statute or are exempted by it, amounting to nobody knows how many billions of dollars. In view of these facts, one may be pardoned for concluding that the foregoing estimate of intangibles in this state may not be too high.

It is interesting to note that the tax suggested would amount to a trifle less than four mills on the dollar of the principal of the securities from which the income is derived, a rate that has been much in favor in states where intangibles have been classified. It is also interesting to note that only the returns from intangibles are included in the estimate. The very large income from personal effort as well as that from other sources, is not considered at all.

This plan would give the state as a state an adequate and desirable system of taxation. Flexibility would be one of its chief merits. The varying demands for revenue could generally be met by fractional changes in the rate of taxation. If enough were not supplied in this way recourse could be had to the great volume of income from occupations and from business of some or all sorts, which for a time at least it should not be necessary to touch. Moreover, the tax would be easy to assess, as the amount of income could be ascertained and returned by the party taxed, as it now is under the federal law. And it would also be easily collected since it could always be taken from income without liquidating fixed and unproductive property as is sometimes necessary under the present system.

The counties would in no way be prejudiced by the plan. Indeed the bulk of their revenue would be received with greater promptness and certainty than if involved in settlements with a score, more or less, of

cities and towns. Settlements would still be necessary but they would be reduced in importance and much simplified.

The cities and towns would need to sacrifice the savings bank tax of about $650,000 and a small and rapidly decreasing sum derived from the direct taxation of money at interest, as such taxes would of course have to be discontinued. On the other hand, they would be relieved of the direct state tax now amounting to $750,000 and sure, if continued, to be increased year by year. The annual net saving to these municipalities would be very considerable. And the burden of maintaining the state government to the extent of the property taxes now devoted to that purpose—that is, the state tax of $750,000, just mentioned, and the $550,000, plus, of public service taxes now retained by the state, or upward of $1,300,000 in all, and the necessary increase thereof—would in the form of a tax on income, be shifted to the shoulders of the wealthy and well-to-do who now escape taxation as far as their intangibles are concerned.

The county tax apportioned to the cities and towns as at present, would be so inconsiderable as to afford slight inducement for undervaluation, and if the suggested distribution of receipts from public service taxes were made to the counties in proportion to their taxable property there would be a strong tendency toward full valuations.

This study has been made in spare hours for the purposes of entertainment as well as utility. It has been prompted by a firm conviction that we are on the eve of the taxation of income, either by constitutional authority or otherwise. Under an appropriate amendment a technical income tax might be enacted, one to aid the general property tax in every district but not wholly to take its place in any. It would almost certainly have graduated and progressive features and be broad and comprehensive in its application. But unless the requisite constitutional concession is speedily obtained, the less desirable plan outlined in this paper will need to be adopted or some substitute found.

Note: The arguments above stated were chiefly directed to the taxation of income from intangibles because as so limited, they seemed the more certain of early acceptance. A tax on income from all sources was, however, suggested. If this plan were adopted, ample revenue for state purposes could be provided at a low rate. The actual net income returned by New Hampshire under the federal law in 1916, which year furnishes the latest figures now available, was $34,419,226. Add to this the like income received by the savings banks and the total is, in a round amount, $40,000,000. Probably the current sum is much larger. But four per cent of $40,000,000 is $1,600,000. This sum, together with the non-property taxes of $700,000, by common consent largely to be increased by new inheritance taxes, should satisfy the state's needs for an indefinite time. Copies of all federal returns might be required to be sent to the tax commission for assessment of taxes in accordance therewith. Then it could be made the duty of the taxpayers to remit to the commission, the state treasurer or some other designated authority.

If the plan of taxing income from intangibles alone were preferred, the proposed additional inheritance taxes would necessarily reduce the rate materially.

SOME OBSERVATIONS ON THE PROPOSAL TO TAX PUBLIC SERVICE COMPANIES BY A PROGRESSIVE RATE ON GROSS RECEIPTS

ALFRED E. HOLCOMB

In the taxation of public utilities a decided tendency has manifested itself to do so by reference to earnings rather than by valuation. The arguments in favor of this method were perhaps first carefully considered in the report of the Ontario Railway Commission of 1905. Then followed the report of the California Special Commission of 1906 and more recently those of the Connecticut Special Commission of 1913 and the Nebraska Special Commission of 1914. Meanwhile, the system has been working regularly for many years in Minnesota and its results have been subjected to more or less constant analysis and study by the Minnesota Tax Commission

particularly in its reports of 1908, 1910 and 1912.

The adoption of this method of taxation is only possible in states where constitutional provisions permit, and it is therefore impossible in those states where the so-called "uniform rule" of taxation exists. In the few states where such a rule does not obtain, there has been, as above stated, a strong leaning towards the use of earnings as a method of taxation for these industries; and the gross earnings have invariably been chosen, doubtless because of the greater simplicity and the consequent gain in administrative efficiency, with no practical offsetting disadvantages. The states other than Minnesota in which a tax on gross earnings has been provided for the complete taxation of one or more classes of utilities are Maine, Vermont, Rhode Island, Connecticut, Wisconsin, Oklahoma, and California.

With the general increase in taxes there has come from time to time a demand for the readjustment of gross earnings taxes and in Minnesota, in connection with this demand, the suggestion has been made that a possible improvement may be made by a classification of the individual companies within a given class, and by the use of a progressive rate based upon the amount of gross earnings of the individuals in the class. It is the purpose of this paper to examine this proposal and to state the grounds of objection to it as being antagonistic to the theory of the system and as likely to destroy its efficacy as a practical measure of taxation for public utilities.

It is to be remembered that the original plan as set forth in the Ontario report and as developed in the California report, assumes a more or less uniform standard of operating results in a given class of utilities and that these results may be relied upon to remain fairly constant over a series of years in any successfully operated utility; that variations are temporary and spasmodic and tend to correct themselves. Thus the ratios of gross operating revenues to plant and of operating expenses to revenues, are assumed to tend towards uniformity so that it is possible by a mathematical formula to fairly approximate the rate to be applied to gross revenues which will produce a tax substantially equal to the general tax burden borne by other fixed properties subject to advalorem taxation. The rate taken as indicative of the appropriate measure of tax is determined by the use of the ratios above referred to. It is therefore apparent that a departure from this original plan at once assumes a fallacy in the original reasoning and should not be made except upon definite proof of the fallacy, which has not, so far as we are aware, been produced. For present purposes we therefore assume the validity of the basic arguments in the original plan, leaving it to the advocates of the change to challenge them.

Here we may observe that we are dealing essentially with property taxation and not in reality with income taxation. And in fact it is appropriate to suggest that "ability to pay," as determined by income, is not a pertinent expression to use in connection with *business* taxes. That expression is applicable only to the taxation of individuals as such and without regard to their business activities. In a business, the net gains do not appear to denote ability to pay in the sense that the gains denote increasing or decreasing obligations of the business unit to the government. Such gains, except in the exceptional cases of the sole proprietor or the closely held corporation, merely pass through the unit to the individual and in his hands become a measure of increasing or decreasing "ability to pay" and of consequent obligation. Our inquiry, then, in this connection is to determine the fair tax upon the *property* of the business unit, including in such value not only the physical structures but also the value of the whole as affected by its operation as a unit with the franchises, rights, privileges, skill in management, and with all other elements which go to give it value as a going concern.

To further pursue this point, it is appropriate to refer briefly to the respective merits and demerits of property and income taxation and to their functions.

The concept of property as a measure of tax obligation is fundamental in American taxation, although along with it there has always been the vague undeveloped idea of income as a necessary supplemental measuse. In fact, in the earliest times, income was quite definitely recognized as a factor, but, speaking generally, it is only in comparatively recent times that full recognition has been accorded to the essential differences between the two measures. It is

now, however, generally recognized that mere amount of property does not correctly measure taxing ability. It is seen that the vast fortunes are made not only and perhaps not mainly by amassing tangible property but by personal services, exceptional talent, shrewdness in manipulation, the use of credits and those intangible elements which, while producing large income, do not denote actual possession of tangible assets. From this point of view it has come to be recognized that income is really the fairest measure of taxing ability. And when we speak of income taxation we must understand it as net income, otherwise the conclusions would be wholly erroneous.

With this conclusion there arises necessarily the further idea of progression as also an element in producing equality as between individual income taxpayers or classes. It is evident that as the size of the income advances, the ability to contribute also advances, but in a much greater proportion. A person's needs do not advance at all proportionately with the amount of his income. He cannot consume at such an increased rate, and hence his available surplus earnings, which really measure ability, increase in a much greater ratio than his expenses. This is the general justification of progression in income taxation.

From the above, it may be seen that income taxation rests squarely upon ability, but that property taxation, while perhaps originally intended so to rest, has been found to be wholly inadequate as a measure of ability. It is for this reason that progression performs no fair and reasonable function in property taxation. It is only applicable to income and to net income taxation.

Applying the above principles to the question under discussion, it is to be seen that true net income taxation may not be applied to corporations as such. It is, as above suggested, properly applicable only to the individual, and when applied to a corporation loses its potency and becomes at once mainly a more or less arbitrary business tax. This is so because the corporation has no function except to transact business. Its entire assets and income are concerned with business. Its surplus profits simply go to supply the needs of some individual or individuals. There is no room to apply the theory of excess income as measuring ability to pay taxes and thus to introduce progression. Perhaps if a corporation could be conceived of as composed of individuals all living in the same taxing jurisdiction, so that no question of overlapping jurisdiction could arise, it could be treated like an individual and its earnings considered as those of the individuals composing it; but such a condition cannot exist practically. Besides this, there are the added considerations of control of profits, exercised by statute or by competitive conditions, which enter into and complicate the question.

However, in the idiosyncrasies of American taxation, corporations have, as a practical matter, at times and quite recently, been subjected to a *net income tax*, and this problem is one of the newer complications. This practice had not, until the advent of war conditions, been generally carried so far as to impose a progressive rate on the net income of corporations, although the Wisconsin law does actually contain that feature.

It was perhaps unnecessary to go to such lengths in dealing with the subject matter shown in the title of this memorandum which relates to a tax on gross receipts. In dealing with such receipts we are, in the first place, far removed from true income taxation and, having in mind the discussion above as to corporations, it would seem to be apparent, even without the definite aid of judicial construction and laying aside any question of a *business tax*, that the reference to such receipts is and must always be merely a mode of reaching the fair equivalent of a property tax. Such being the case, of course progression is out of the question, if we adhere to the basic principle set up. But in Minnesota, where the gross earnings tax has long been used in the taxation of public utilities, it is definitely settled by the courts and by the trend of legislation that the tax on gross receipts is a commuted tax in lieu of a property tax.

But it may be urged that the tax on gross receipts is really based upon a consideration of net income and is used merely as a more simple basis, and that therefore, admitting that this is a commuted property tax, higher net income means more capital value, and that such value is somehow progressively greater depending upon the mere size of the net income, and hence of the gross income.

This possible argument leads us again into the fallacy of treating corporate income like individual income and of assuming that the free surplus of a corporation is, like that of the individual, a fair basis for measuring ability, and hence for the imposition of progressive rates.

But the fact here is that in dealing with a public utility, increase in gross income necessarily means corresponding increase in expenses, so that the net income remains relatively the same as compared with capital. In other words, a given utility with $10,000 gross earnings will not have necessarily more than ten times the net income of a company with $1,000 gross earnings, hence the capital value or the taxable base — *property* of the two companies, should be subjected to the same tax rate if we admit the validity of the principle of equality of burden which underlies both uniform and progressive taxes.

The whole question must, therefore, rest upon the aim of the taxing body. If they assume to produce equality of burden as between corporations, the tax rate on gross earnings of all companies operating at the same general ratio of operating expenses to gross earnings must be the same.

A public utility is wholly different from a mercantile business. In the latter, increase in gross receipts giving opportunity to turn over the capital more often, may justify a classification based upon such gross receipts, as in such case net return may increase relatively with increase in gross; but with a public utility there is no turning over of capital and increase in gross does not mean relative increase in net return as compared with invested capital. In fact, it is demonstrable in some kinds of utilities that expenses are apt to increase in a larger ratio than earnings, and therefore the company with the smaller gross should in reality fairly be taxed at a greater rate than the company having the larger gross.

We conclude, then:

1. That the income tax when imposed upon a business unit is a business tax and not an income tax.

2. That the income tax, to perform its proper function, assumes the validity of progressive rates depending upon the size of the total net income.

3. That the taxation of gross income is entirely outside the realm of true income taxation. It measures either (a) an arbitrary business or license tax supplemental to a property tax, or (b) a tax in lieu of a property tax.

4. That, as originally conceived and as carried out in state tax laws, the tax on the gross receipts of public utilities has been justified in law and in legislative enactment as a commuted property tax.

5. That it has never been seriously suggested that a graduated rate is appropriate in property taxation, at least where the relative burden of taxation is the concern and there is no element of social reform involved.

6. That when the property in question is wholly employed in an active business, whose net income does not increase at a relatively higher ratio than its gross income but may often show a relative decrease, the impropriety of suggesting a progressive rate is even more apparent.

NOTES AND NEWS ITEMS

The eighth annual New York state tax conference was held at Albany, January 22-24, under the joint auspices of the state tax commission and the New York State Tax Association, and was notable for the attendance and the high quality of the addresses. It was estimated that at some of the sessions, close to one thousand were present. Official delegates consisting of local taxing officials from nearly every portion of the state were registered and the discussions were at times lively and of great interest. The fiscal situation in this state is such that some quite extensive legislative proposals will be seriously agitated.

Professors Seligman and Bullock participated, the former giving a comprehensive address, suggesting fundamental changes, including a state income tax, with supplemental super-tax to be applied locally and a limitation of the tax rate on realty in New York City. Professor Bullock devoted an evening to an interesting description of the work of the committee of this association on a model tax system and explained in detail the report of that com-

mittee. His address will serve to effectively supplement the report. Leading members of the legislature now in session made addresses, as did the fiscal officers of the state and the city of New York.

The investigations which have been proceeding under the auspices of groups of citizens, were explained by their representatives, and at one session problems of corporate taxation were discussed by leading lawyers, one feature being the discussion of the article on franchise taxation by Professor Hunter which was printed in the BULLETIN for November and December.

The Round Table session, devoted to problems presented by local assessors was, as usual, well attended and brought excellent results.

Mr. Charles J. Tobin read a paper advocating a uniform date for assessment throughout the state in place of the varying dates now in force.

Judge Walter H. Knapp, president of the state tax commission, and Messrs. Ralph W. Thomas and John J. Merrill, members of the commission, took an active interest in the conference, the success of which was mainly due to their co-operation and assistance.

Among the resolutions was one endorsing the principles of the "Model" committee's plan and directing the appointment of a committee to report on its practical application to New York. The following officers were elected: President, Ogden L. Mills, New York; Vice-Presidents, Edwin R. A. Seligman, New York, John J. Merrill, Albany, Charles J. Tobin, Albany, William J. Wallin, Yonkers; Secretary and Treasurer, Leo Day Woodworth, 55 Liberty Street, New York.

Readers will doubtless be interested in the address by Judge Brown of the New Hampshire commission, which is printed elsewhere in this issue. His unique suggestion of relief from the effects of constitutional provisions for "uniformity" is a specimen of Yankee ingenuity which is well worth thinking about seriously.

In North Carolina matters are apparently progressing well. The special commission has made its report. Mr. A. J. Maxwell, a member of that commission, and also of the state tax commission, has published an important and interesting communication which he sent to the Governor. We had expected to print it in this issue but were unable to do so. It will appear in a later issue and will be of help in all states. A constitutional amendment is under way to provide for an income tax.

The Louisiana commission has been doing effective work under most discouraging conditions due to years of neglect of taxation matters in that state. Commissioner Milling made an important address at the recent meeting of assessors which will be distributed throughout the state, together with copies of the Model System committee report of this association which he procured for the purpose. We hope to print his address shortly, together with one by ex-President Howe of Kansas who addressed the conference.

In Utah the electors at last broke through the barriers and adopted in November an amendment to the constitution which will provide much wider latitude in the taxation of mines, which are of such importance in that state. Our genial friend Bailey, secretary of the state board of equalization, may well feel a sense of satisfaction at this long-hoped-for result for which he has been so earnestly contending.

The report of the committee on a model system of taxation has had a reception throughout this country and in Canada which is most gratifying. Professor Bullock and the other members of the committee may feel well repaid for the time and thought given to this work. By all odds, it may be considered the most helpful single document ever issued by this association, or for that matter by any other source. Three editions of the report have been printed, and calls for it continue to be received from many parts of the country and abroad. It has been distributed in quantities in Rhode Island, Louisiana, Indiana, Minnesota, and New Mexico. The Missouri commission was kind enough to reprint it in full in its first report, a most interesting document. The committee on taxation of the New York state bar association did the same, and Commissioner Galloway of Oregon writes of his intention to do so.

The chief characteristic of this report lies in its freedom from impractical sug-

gestions. It presents in a perfectly natural and matter-of-fact manner some simple propositions which we at once accept, because reflecting normal and natural methods of providing revenue. Its great value is that it brings these natural tendencies into some sort of logical arrangement so that they may be practically used to arrive somewhere. In this aspect the report is in sharp contrast with present practices under which these same tendencies are made to work in such ways as to nullify each other and to create more or less chaos, merely because of the absence of a plan.

Not the least of the merits of the report is that its suggestions do not require entire revision of present laws—an impossible demand—nor is the adoption of the complete system necessary. Existing laws may, with few modifications, be used. Single steps may be taken and a gradual development secured without causing undue strain.

In Montana, under the lead of the special tax and license commission, legislation is being planned which seems likely to greatly improve the tax situation there. A classification of property along the lines of the Minnesota law is being proposed, accompanied by a constitutional amendment and provision for a state tax commission. All of which is a new development in that state.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

BANKS—EQUALITY AND UNIFORMITY—EQUALIZATION.—The operation of the taxing statutes of Colorado, including the effect of horizontal increases ordered by the State Tax Commission and the State Board of Equalization, have recently been discussed and increases so ordered sustained. The assessment upon complainant bank's shares was ordered increased, along with all other real and personal property in the county, by 63 per cent. This action was attacked as lacking in due process and as casting an unequal burden upon such shares as compared with other similar property in other counties in which the same percentage of increase had not been ordered. This contention was held unsound. The action was sustained as appropriate under a tax system declared "peculiarly safe and sound" whereunder the local authorities have supreme authority to cause equality of valuation upon the property of individuals within the counties; a Tax Commission and a State Board of Equalization have like power to take the aggregate returns from the several counties and if they find that a county has had its property assessed too low in reference to the standard of full cash value, they may raise its valuation." The situation was held to differ materially from that involved in the case of *Cummings* v. *Bank* (101 U. S. 153), because in that case there were four different bodies acting independently of each other in regard to as many different classes of property and there was no means of relief through a supervisory board with authority over all, to finally fix values.—*First National Bank* v. *Patterson*, 176 Pac. 498.

SITUS OF MERCANTILE ESTABLISHMENT.—A corporation having separate business houses at various points in a state, is taxable at each on account of property there. Such credits as arise from the business at each establishment are subject to deduction on account of debts incurred in the conduct of the business at each, regardless of the fact that the principal place of business is at one point in its state where its financial operations are conducted.—*Nye-Schneider-Fowler Co.* v. *Boone County*, 169 N. W. 436.

MINERALS IN PLACE — SPECULATIVE VALUES. — A landowner made a conveyance, reserving all coal, oil and minerals, and the right to enter and operate. Thereafter the coal under the land was assessed. It was held that the reservation created an estate in fee simple of the coal and minerals which was real estate and was assessable as such as an interest in land.

It appeared that no coal had ever been mined from the land and no tests had been made to ascertain whether there was coal thereon. Experts testified that the valua-

tion of coal in place was speculative and depended upon many circumstances. The assessors testified that they did not know that there was any coal on the land. It was held that the existence of coal was mere conjecture and that the assessment should not exceed a nominal amount.—*In re Colby*, 169 N. W. 443.

Valuation — Earning Power. — In a recent case involving a claim of over-assessment of a drainage canal with appurtenances consisting of dams, electric power plants, etc., it was held that the cost of construction, less depreciation, could not be accepted as the cash value, the court observing that "it must be conceded, generally speaking, that the fair cash market value of property depends upon the amount of earnings that property will net for the owner when employed to its capacity or to the capacity that its patronage will insure. Other factors may enter into the calculation of value."—*Sanitary District of Chicago* v. *Young*, 120 N. E. 818.

Real Estate — Transmission Lines. —Poles set in land owned by the taxpayer upon which wires were strung, and steel towers and spoil banks, were held real property, and the real property having been assessed, it would constitute double taxation to assess these structures again as personal property. — *Sanitary District of Chicago* v. *Young*, 120 N. E. 826.

Corporations—Gross Receipts.—Construing the Pennsylvania tax law on gross receipts of electric light companies, it was held that the company was only taxable on the receipts derived from the business which it was authorized to transact as an electric light company and not on its receipts from the sale of steam or merchandise.—*Commonwealth* v. *Harrisburg Light & Power Co.*, 105 Atl. 80.

Reassessments.—Under the Wisconsin statute, power is given the Tax Commission to order a reassessment when the challenged assessment is not in substantial compliance with the law or when the public interest will be promoted thereby (Sec. 1087 — 45 Stats. 1917). The question arose as to whether the reassessment must be ordered within any special time-limit, no limit being fixed in the law. In the case in question the proceedings were not begun until after the tax roll had been completed and was lawfully in the hands of the collector. It was urged that this was too late. The court, while conceding that reassessment proceedings should be reasonably and diligently instituted, held that no reason was apparent why proceedings begun after the roll was completed should be held too late when proceedings begun before but completed afterwards were specially recognized in the law by a provision for readjustment. The court withheld expressing an opinion as to whether it would be an abuse of discretion to order a reassessment where one or more assessments have intervened, but held that in the instant case, the proceedings came within the discretionary field of the tax commission; that the law should be liberally construed to effectuate the desired result of equal distribution of tax burdens.—*State* v. *Haugen et al.*, 169 N. W. 555.

Foreign Corporation License Fee—Capital Stock. — A decision of decided interest to foreign corporations doing business in Wisconsin, holds that the words "capital stock" in the statute providing for an annual license fee, means the issued capital stock and not that authorized to be issued or, as the court suggests, the "potential" capital stock. This view of statutes of this character which are common, and in which oftentimes "authorized" capital stock is specifically stated as the basis of the fee to be determined by a proportion of assets or business in and out of the given state, seems well grounded, as in the language of the opinion the Legislature was evidently referring to "actualities rather than potentialities in fixing the basis for computation of the license fee."—*State* v. *Hull, Secretary of State*, 169 N. W. 617.

Corporate Excess — Apportionment to State.—The Rhode Island statute provides for the apportionment of the "corporate excess" of corporations doing business both within and without the state upon the basis of the "fair cash value of their real estate and tangible personal property in this state." The corporation in question, in order to attain more favorable taxation in a neighboring state, procured the incorporation of a separate corporation under the laws of such state and

transferred to it the property therein situated. Thereafter, in seeking to reduce its assessment in Rhode Island it claimed that the tangible property of such subsidiary company should be treated as its own, for the purposes of taxation in Rhode Island, relying particularly upon the decision in *Commonwealth* v. *Westinghouse Air Brake Co.*, 95 Atl. 807. The court rejected this claim, holding that even though "in many cases the law regards the substance and not the form, and the courts, very properly, in certain cases, look beyond the corporate entity to the individuals who are interested in the corporation," the principle cannot be invoked when, as in the case in question, the company, "for its own advantage, claims in one jurisdiction the full benefit and legal effect of the corporate entity, and in another jurisdiction, likewise for its own advantage, it asks that the act of incorporation be disregarded." The company was held not entitled to allowance for the property in the foreign state owned by its subsidiary.—*Washburn Wire Co.* v. *Bliss*, 105 Atl. 179.

Powers of State Board of Equalization.—A statute authorizing a Board of Equalization to "take all evidence it may deem necessary" in the performance of its duty to "ascertain the value of the property in the different counties in the state," is held to authorize the employment of a stenographer and the payment of his charges, without a special appropriation for the same. The word "take" is held to be broader than the word "hear." It is suggested that the charges in question would be much less than the expense of the members of the Board if it were required to remain in session while the secretary took down the testimony in longhand.—*State* v. *Hackman*, 207 S. W. 64.

Inheritance Tax—Federal Estates Tax as Expense.—The effect of the federal estates tax upon specific legatees has been passed upon by the Appellate Division of the New York Supreme Court, and it has been held that no part of the federal tax is chargeable against specific legacies, where there is no direction in the will as to the apportionment of the tax. The court observes that the tax is not a direct tax, that if it were it would be unconstitutional (*Matter of Bierstadt*, 166 N. Y. Supp. 168), nor a legacy tax as was imposed by the act of 1898 (*Knowlton* v. *Moore*, 178 U. S. 41), nor a tax upon property, but a tax upon the transfer thereof. The title passes from the decedent charged with the tax which is a charge against the estate, like any other debt or claim. While it is not deducted as an expense in assessing the state transfer tax (*Matter of Sherman*, 166 N. Y. Supp. 19), it is none the less a charge against the estate. The will gives no directions as to the apportionment of taxes or other claims. It makes certain bequests, closing with a residuary clause. The residue of an estate means what is left after the payment of debts and other charges and of specific bequests. There is nothing in this will to indicate that such a tax should be apportioned so as to include specific legacies.—*Appeal of Wellington et al.*, 172 N. Y. Supp. 787.

The reader will find an interesting discussion of this question, with full review of the holdings of the various courts, in an opinion filed by Henry W. Jessup as referee in the accounting upon the estate of James B. Brady, which is printed in full in the *New York Law Journal* of January 11, 1919.

Penalty Tax on Non-Registered Securities.—The decision of the Surrogates Court of New York County holding unconstitutional the penalty provision imposed upon securities found in a decedent's estate upon which the registration tax had not been paid during the lifetime of the decedent, has been affirmed by the Appellate Court. The court holds that, assuming the tax to be a direct tax, it is so arbitrary and unequal in its operation as to be unconstitutional within the rule of such cases as *Cotting* v. *Kansas City Stock Yards Co.* (183 U. S. 79) and *Gulf C. & S. F. R. R.* v. *Ellis* (165 U. S. 150). It is held, however, not to be a direct tax but a transfer tax, and as such to be equally in violation of the accepted rules governing such taxes, because not being a classification having any just relation to the act in respect to which the classification is made. *In re Watson's Estate*, N. Y. L. J., January 18, 1919 (see N. T. A. Bul., IV, 60).

Income Tax — Taxable Income.—Some obscurity arose from the publication

of Treasury Decision 2747, issued July 12, 1918, wherein it was held that the proceeds of an accident insurance policy and amounts received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident, were not taxable income. It transpires that this ruling was based upon an expression in *Doyle* v. *Mitchell Bros.* (247 U. S. 179), quoting from *Stratton's Independence* v. *Howbert* (231 U. S. 399, 415), that "income may be defined as the gain derived from capital, from labor, or from both combined."

EXEMPTIONS — INDIAN LANDS. — The United States Supreme Court has recently considered the effect of certain federal statutes relating to the exemption of Indian lands. The lands in question were part of lands formerly owned by a Creek Indian and which were conveyed to her pursuant to the Act of Congress of March 1, 1901. The conveyance, pursuant to the act, contained a clause stating that the lands should be inalienable and non-taxable for twenty-one years. Thereafter, by the act of May 27, 1908, the restriction against alienation was removed and the land declared to be subject to taxation as though it were property of other citizens than Indians. Plaintiff contended that, notwithstanding this latter statute, exemption from taxation and inalienability were two separate things and that it did not follow that alienation removed the tax exemption. The court held otherwise, resting its conclusion mainly on the principle that as plaintiffs took their title pursuant to the act of 1908, they could not go behind it and claim the benefit of an exemption expressly removed by the same act; that it invaded no right of the Indians to make alienation of the land a surrender of the exemption; that this was not a case of abstract rights but of rights as determined by the acts of the parties; that the act took nothing of value from the Indian, "the value of a thing is determined by that which makes its worth." . . . "Under the restriction against alienation, the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things"; while the exemption might be an element in the price, that was not of concern to the purpose of the law, which was to give the Indian all of the attributes of ownership equal to those of other owners and nothing more.—*Fink et ano. &c.* v. *Board of Commissioners*, U. S. Sup. Ct., January 13, 1919.

INCOME TAX — TAX FREE RENTALS.— Reference was made in the January BULLETIN (p. 104) to recent Pennsylvania decisions, the text of which was not then available. The prevailing and dissenting opinions appear upon examination to present the opposing views as to the real intent and purpose of a personal income tax. The former proceeding upon the theory that the contract in question related to the yearly rental as such which the obligor had contracted to pay in full without deduction; the latter upon the view, as expressed, that consideration of the case "should be approached with this guiding thought in mind—the law contemplates that each person shall pay his own income tax, and this course must be pursued unless it plainly appears another has contracted to assume the burden for him." This latter thought is fully argued and expressed in the opinion of the District Court (23 Pa. Dist. Rep. 1055).—*Ehrlich et al.* v. *Brogan et al.*, 262 Pa. 362.

The opinion of the Superior Court cited in the BULLETIN (65 Pa. Super. 384), may here be noted for purposes of reference. It recites that the case was a suit by the grantor of real estate, conveyed in 1906, who had reserved a yearly ground rent of $10,000, payable quarterly, to recover the amount of income tax of $25, withheld by the grantee pursuant to the withholding provisions of the income tax law of 1913. [The covenant in the grant is set out in the BULLETIN of January.] The grantor claimed that the tax was payable by the covenantor or his assigns, citing *Pollock* v. *F. L. & T. Co.*, 157 U. S. 429, and *No. Penn. R. R. Co.* v. *P. & R. Ry. Co.*, 249 Pa. 326. Grantee urged that he had agreed to pay taxes on the ground rent itself, *i. e.* upon the distinct species of real estate reserved out of the grant and not taxes on the payments of rent, such as the federal income tax, even assuming that it could be regarded as a tax levied on the payments of rent; that in any event there was an ambiguity which should be resolved in his favor. The court below (the District Court) had entered judgment for the

defendant grantee and the appeal was heard upon an agreed statement of facts. It was held, two judges dissenting, that the withholding provisions of the act created defendants collectors for the government of the income tax as respects rent; that nothing would warrant the view that the act was intended to strike down a covenant that the tenant should pay a tax of this character; that the minute provisions of the act with regard to the annual payment of rent, for withholding the tax, and a description of the payment which is exacted as a tax, forbid the conclusion that the tax is not levied upon the payments, the source from which a part of the income is derived, citing *Suter* v. *Jordan Marsh Co.*, 113 N. E. 580; that the real question is the meaning of the parties, citing *No. Penn. R. R. Co.* v. *P. & R. Ry. Co.*, and *Catawissa Ry. Co. v. P. & R. Ry. Co.* Upon this principle it was asserted that if the parties had known that a federal income tax was in the future to be imposed and that the tenant, under that law, would be required to pay the tax on the yearly rent, they could not have used words more fitting to forbid the tenant from deducting the amount of the tax from the rental; that it was manifestly the intention of the parties to secure to the grantor the full payment of the yearly rental without deduction for the tax in question.

An Accomplishment by a Taxpayers' Association — Excessive Estimates — Correction at Suit of Taxpayers.—A possible method open to taxpayers, of enforcing economy and efficiency and reducing waste, is suggested in a recent decision by the District Court of Pennsylvania. A bill in equity was filed by taxpayers of Northumberland county, praying the court to revise the estimated receipts and expenditures prepared by the comptroller upon which the county commissioners had adopted a six-mill tax and to enjoin the collection of any tax in excess of two mills. The court held that though legislative authority be given to impose a tax for certain purposes, if the tax levied be clearly in excess of the sum required for that purpose, its collection might be enjoined. Applying this principle to the case in question, the court, after an elaborate review of the allegations in the bill, found that the estimates were clearly excessive and ordered that the county commissioners be restrained from collecting a tax for county purposes in excess of four mills; that the estimates of expenditure be corrected by reducing certain items totalling $33,577.39 and that the estimated receipts, other than from taxation, be increased from $192,580 to $232,645.

It appeared that the proceeding was instituted by a taxpayers' association, and it was alleged that this being so, the action was not brought in good faith for the benefit of the public but by a group of coal corporations to avoid the payment of their just share of the current expenses. This charge was held to be absolutely without merit; that the proceeding may have been instituted by an alleged taxpayers' association, yet no advantage could be gained by them which would not accrue to all taxpayers.

The cases cited by the court are inserted, in view of this rather unusual proceeding. They are *St. Clair School Board's Appeal*, 74 Pa. 252; *Appeal of Com'rs*, 103 Pa. 356; 1 *Eastman on Taxation in Penna.* 136; *Snyder* v. *School District*, 4 Westmoreland L. J. 13, approved in 246 Pa. 569; *Davis* v. *School District*, 4 Pa. C. C. Reps. 656, and *McKeown* v. *Commis'rs*, 22 Dist. R. 313. — *Nagle* v. *Northumberland County*, 27 Pa. Dist. Rep. 1055.

State Taxation as Encroachment on Federal Powers. — In the January *Harvard Law Review*, Professor Powell continues his brilliant series of articles dealing with this important subject. In this issue, which is the fifth in the series, he takes us through the mazes of legal gymnastics by which, with much travail, the Supreme Court is gradually developing the limits of state and federal taxing power. To the practitioner these articles are of course of very great assistance, but they have another and perhaps a more important use to those officials, and others, including, we believe, the great body of members of this Association, in that they present the most helpful contribution that has yet been afforded, towards the final solution of the problem of harmonizing and co-ordinating the respective fiscal systems of the states with each other and with that of the federal government, a problem which is of such pressing importance.

Lest there be those who would consider these articles abstruse and technical and of interest only to lawyers and to be uninviting to the layman, let it be said that the fact is entirely otherwise. Professor Powell's style is peculiarly free from heaviness and his lively comment and discussion of the perplexities of our great Justices in dealing with these questions, sparkle with keen humor, rendering the articles distinctly entertaining as well as instructive.

The present article opens with a review of the early cases involving taxes on instrumentalities engaged in interstate commerce and proceeds with a critical analysis of the varying trend of argument through which the court has passed, as its members have changed and as new impressions of the subject have come to individual Justices in passing upon the differing situations presented. The conception of value as depending upon earning power, first fully recognized in the *Backus* case (154 U. S., at p. 445) and the inconsistency of declaring that the taxation of such value when determined by earnings from interstate commerce, is not in reality an interference with such commerce, are pointed out.

The development of the unit rule of assessment of railroad and telegraph companies is described, with analysis of the cases and of those which extended the rule to the taxation of express companies, with copious extracts from the opinions and from the briefs and arguments of counsel, thus giving one a peculiarly satisfactory basis for an understanding of the subject.

Special Assessments—Cemetery Associations.—No little friction has developed from the claimed immunity from special assessments of private cemetery associations. A case involving this question has just been decided by the U. S. Supreme Court. The state court had decided that the cemetery land was liable to assessment under the constitution and laws of the state (Missouri); that the land owned by the association was chargeable with its share of the cost of constructing the sewer; that the presumption was in favor of the reasonableness of the ordinance and that satisfactory notice was afforded the complainant (239 Mo. 681; 259 Mo. 142; 268 Mo. 691).

As the judgment of the state supreme court was final on questions of state law, the case reached the Supreme Court because of the contention that it violated the fourteenth amendment in that its effect was to deprive the plaintiff of its property without due process of law and to deny it the equal protection of the law.

In support of these contentions plaintiff claimed that about one-half of its thirty-four acres had been conveyed for burial lots and that the assessment against the entire tract was an arbitrary imposition. As to this, the court referred to the holding of the state supreme court, that the fee in the burial lots was still in the association with an easement in the lot purchasers; that the association had a title which that court held might be, and was, the subject of assessment; that there was no deprivation of due process in this.

It was further argued that the association was not benefited, but it was held that the extent of the benefit was a matter for control by local authorities, whose judgment would not be disturbed in the absence of an arbitrary and unreasonable assessment (*Spencer* v. *Merchant*, 125 U. S. 345, 356; *Wagner* v. *Baltimore*, 239 U. S. 207; *Houck* v. *Little River District*, 239 U. S. 254).

It was urged that no notice was given prior to the creation of the sewer district and that due process was denied. The court observes that the creation of these districts was authorized by legislative authority, and further that the record showed that the owner had full opportunity to be heard in judicial proceedings to enforce the tax, and that its contentions had been considered and decided, which constituted due process (*Davison* v. *New Orleans*, 97 U. S. 701, 711; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 251).

The court repeats the declaration that it "does not interfere with the taxation and assessment laws of the states as violative of the Fourteenth Amendment unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned." — *Mount Saint Mary's Cemetery Association* v. *Mullins*, U. S. Sup. Ct., Jan. 27, 1919.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

Oberlin, Ohio

ARIZONA. Proceedings of the state board of equalization of Arizona. 89 p. Phoenix, 1918.

ARIZONA. Report of proceedings of the sixth tax conference. Sixth annual session, Grand Canyon, July 22-26, 1918. 177 p.

The conference was devoted to a minute scrutiny of the tax roll of each county and a close quiz, conducted by the tax commission, into any marked variations from the previous year's figures.

BELLOU, MAURICE. Une erreur dans le taxation du blé. *Journal des Economistes*. Tome LX, pp. 78, 206. October and November, 1918.

Holds that the government's policy has failed to stimulate wheat production and advances some suggestions looking to the correction of this error.

BULLOCK, C. J. Address on the report of the committee of the National Tax Association on a model tax system, before the Cleveland Association of Building Owners and Managers. 28 p. Cleveland, 1918.

BULLOCK, C. J. War taxes and our industrial situation. 25 p. Cleveland, 1918.

This paper is an advance publication of a portion of a report on the federal income and excess-profits taxes, prepared by Professor Bullock for the Committee on War Finance of the American Economic Association. The data were secured in part from financial manuals and in part through field investigation.

CONSTITUTIONAL REVIEW. Federal taxation and state rights. Vol. III, p. 34. January, 1919.

This editorial comment is based upon the House proposal to include in the new revenue bill a clause imposing taxation upon incomes derived from the interest on state and municipal bonds, and also on the salaries of certain state and municipal officials. The view that the sixteenth amendment has opened the way for the taxation by the federal government of all incomes from whatever source derived is vigorously and effectively combated.

FAIRCHILD, F. R. The finances of Santo Domingo. *Pol. Sci. Quart.*, vol. XXXIII, p. 461 (December, 1918).

A general description of the financial system of the island. The most significant features of this revenue system are the complete reliance upon indirect taxes and the great importance of the customs. The improper adjustment of tax rates and the inequitable incidence of the indirect taxes are in part responsible for the country's backward economic position. The article concludes with a discussion of the difficulties which would be encountered in the introduction of the more important forms of direct taxation.

KANSAS. Sixth report to the legislature by the tax commission. 66 p. Topeka, 1918.

This report contains certain statistical data relative to property assessments, tax rates and the distribution of tax receipts to the different funds, together with some other information concerning the operation of the tax system. It also contains the commission's discussion of the tax situation in Kansas and its recommendation for new tax legislation.

The principal recommendations are the following: an amendment of the inheritance tax law to cover bequests to direct heirs; the creation of the office of county assessor, with full authority to assess all property; the abolition of the uniform rule in the constitution; and central assessment of the property of electrical transmission companies.

One of the commission's most important functions, supervision of the tax system, has been very imperfectly performed because of the impossibility of securing uniformly good results from the two thousand local assessors in the state. The commission feels that its persistent efforts have resulted in a better equalization in 1918 than in any preceding year, but it adds that the state is a long way yet from even approximately equal assessments. The enlargement of the assessment districts under a county assessor has been recommended by the commission for years as one of the necessary conditions of reasonably good assessment practice.

MONTANA. Report of the tax and license commission to the state board of equalization, 1917-18. 204 p. Helena, 1918.

This is the report of a special tax commission created in 1917, for the purpose of studying the tax system of the state and reporting upon desirable improvements. The state has increased in wealth and population to such proportions that the general property tax, with the primitive administration that has always characterized this tax in its early stages, no longer suffices to supply the needed public revenue without producing intolerable injustice. The special commission has rediscovered in Montana many of the defects of this tax that have been so marked in other states.

The statutory requirement of full value assessment has become a dead letter; there are gross inequalities in the local assessment of lands and tangibles; intangibles wholly escape in large quantity, and the system of equalization is not above reproach.

The recommendations are broadly comprehensive and together form a tolerably complete tax reform program. The report contains, as an appendix, a series of bills which cover the recommendations. Among these are a bill for the establishment of a permanent tax commission, a bill for the classification of property, and one providing a method for the assessment of inter-county telephone, telegraph, power transmission and irrigation companies.

The commission's suggestions are all useful. The weakest feature of the program is the proposal to incorporate the provision for a state tax commission in the constitution. That instrument already provides for an *ex-officio* state board of equalization and the repeal of this provision is necessary in order to secure for the proposed commission with full authority over all parts of the tax system.

New York. Report of the committee on taxation of the New York State Bar Association. 111 p. New York, 1919.

This report embraces recommendations upon three points. The first is an endorsement of the model system of state and local taxation, prepared by the committee of the National Tax Association, with the suggestion that least disturbance to the existing tax structure in New York would result if a suitable combination of the three methods proposed in the model plan were worked out.

The second topic is the tax upon the net income of manufacturing and mercantile corporations. This tax is approved, and its extension to miscellaneous corporations is recommended. The third topic is the impossible special franchise tax law. The committee agrees that a more satisfactory system should be devised, but was unable to agree upon a recommendation for a substitute. Three appendices contain, respectively, a reprint of the plan for a model system of state and local taxation, the report of the joint legislative committee on net income taxation as applied to business corporations, and a brief discussion of the special franchise tax.

North Carolina. Report of the corporation commission as a board of state tax commissioners. Advance sheets. 20 p. Raleigh, 1919.

Contains recommendations for the repeal of the constitutional prohibition upon the taxation of the income from property, and for the introduction of improved methods of assessing and equalizing real property in the next revaluation.

Peloubet, Maurice. Operation of the British excess profits duty law. *Journal of Accountancy*, vol. XXVII, p. 17 (January, 1919).

The British excess profits tax law is superior to the French or any other European law on this subject, but it is defective in its method of calculating "standard" or "normal" profits, in that it allows a portion of the excess profits to be retained; and because the law relates almost solely to the financial rather than to the productive or operating side of business.

Vermont. Biennial report of the commissioner of taxes. 166 p. Rutland, 1918.

Wisconsin. Ninth biennial report of the Wisconsin tax commission to the governor and legislature. 83 p. Madison, 1918.

This report is intentionally less voluminous than some of its predecessors have been. A very complete discussion of the state's tax problems in 1916 received such scant consideration from the legislature that the commission refrains from covering the ground again. The operation of the income tax continues to be satisfactory, both from the standpoint of yield and administration. The commission urges, however, the repeal of the peronal property offset provision, which was included originally merely as a temporary expedient to insure normal revenue while the income tax was in the experimental stage. It is a useless expense to assess incomes only to have the tax nullified by personal property tax receipts, and it leads to false classification of property locally assessed. Other recommendations ask for taxation of residents of the state on their income from all sources and for a clearer deduction of the losses which may be deducted from gross income.

The creation of the office of county assessor is again strongly urged. Supervision of the local assessor continues to be one of the commission's most serious administrative problems, and the enlargement of the assessment district, together with the merit system, would go far toward reducing his problem to manageable proportions. The situation has been made worse by the recent changes in the reassessment statute. The commission's loss of power here is already reflected in the assessments and in the attitude of local tax officials, especially in the northern counties. The practical effect of this pernicious change, made in 1917, has been to deny the right of appeal for a reassessment to the larger landowners, who alone are able to muster a petition signed by the owners of 10 per cent of the taxable property of the district to be assessed. The commission asks that the original reassessment statute be restored and broadened.

A final recommendation relates to the desirability of taxing all light, heat and power companies in the same manner, instead of discriminating, as at present, between those which are operated in connection with street railways and those not so operated. The former are now taxed at the average state rate, while the latter are taxed at the local rates.

Wyoming. Fifth biennial report of the commissioner of taxation of Wyoming. 76 p. Cheyenne, 1918.

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EXECUTIVE COMMITTEE APPOINTMENT

The executive committee has unanimously selected A. J. Maxwell, member of the North Carolina Tax Commission, to fill the vacancy in the committee caused by the death of Judge Hart. Mr. Maxwell has had a large experience with tax problems and has the important additional qualification due to the fact that this commission constitutes the corporation commission, dealing with the regulatory problems. We congratulate ourselves upon his acceptance of the appointment and his consent to give us the benefit of his wide administrative experience.

THE CONFERENCE AGAIN

With the passing of the influenza epidemic and the gradual decrease of pressure on tax officials in connection with the legislative sessions, which are rapidly coming to a close, the reconsideration of possibilities for a conference presents itself. The natural discouragement due to the first postponement, and emphasized by the second, has to a considerable degree worn off, and there is definite evidence of a revival of the feeling of the especial need for a conference.

The considerations which led to the very general demand for a conference in the fall, again present themselves. Doubtless the legislative discussions, which have been directed largely towards temporary and emergency revenue measures, have emphasized strongly the peculiar advantages of our conferences, at which those specially trained may confer in a helpful manner concerning the unusually important fiscal problems confronting the localities, states, and the nation.

All things considered, it has seemed to the officers that it would probably be a mistake not to utilize the advantages to be gained through a conference in the near future, while the sentiment of the public as expressed in the legislative sessions and otherwise on these problems is well in mind. The natural conclusion would seem to be to hold the conference at St. Louis, the place originally selected and most available, early in June or even at the end of May. These observations are submitted tentatively in order that members may be prepared to co-operate actively and energetically with the executive committee in its final decision. Comments and suggestions are urgently requested.

MAR 1 1919

NOTES AND NEWS ITEMS

THE CLASSIFICATION CAMPAIGN IN OHIO

Ohio has been fighting consistently and continuously for twenty years to write into its constitution an amendment permitting the classification of property for purposes of taxation. The Buckeye state has a rigid uniform rule under which taxation troubles have been increasing from year to year. In spite of the fact that the people at the November, 1918, election approved a classification amendment, the whole campaign will have to be repeated, as the supreme court of the state declares it to be invalid because it conflicts with another amendment submitted to the people at the same election.

The situation is a complicated one, and it is decidedly trying to classification proponents to have a hard-fought victory now snatched from them by a court decision. It means another campaign and an immediate one; but classificationists look for a successful outcome, because the people are better informed about classification than they were when they voted in November last.

The classification provision, approved by the voters and disapproved by the court, reads:

> "The General Assembly shall provide for the raising of revenues for all state and local purposes in such a manner as it shall deem proper. The subjects of taxation for state and local purposes shall be classified, and the rate of taxation shall be uniform on all subjects of the same class, and shall be just to the subject taxed."

The proposed amendment was put on the ballot through an initiative petition circulated by the Ohio Taxpayers' League, an association organized for the special purpose of conducting the classification campaign. Over 120,000 names were secured to petitions in less than one month. The filing of the petitions automatically placed the proposition on the ballot at the November election.

A campaign of education was conducted by the Ohio Taxpayers' League extending over a period of three months. The proposition was approved by the voters with a majority of over 30,000.

Practically the same amendment had been submitted four times before, through the efforts of the Ohio State Board of Commerce, and while classification received a majority vote, the amendments were lost because prior to 1912 the constitution required a majority of all votes cast at the polls to carry a constitutional amendment. Since 1912 a majority cast on the proposition itself writes an amendment into the constitution.

A Conflicting Amendment

At the November election two taxation proposals were submitted to the people. One was for classification as described above, and the other was to give the legislature the power to exempt mortgages from taxation. As explained, the classification proposal was submitted through the initiative. The mortgage exemption amendment was submitted by resolution of the General Assembly.

Of course, both amendments affected the same section of the constitution (Art. 12, Sec. 2). In the case of the mortgage exemption amendment, it was necessary to print all of section 2, including the uniform tax provision. In the case of the classification amendment, all of section 2 was of necessity set forth, but the lines providing for the uniform rule were displaced by the new matter on classification. Both amendments were approved by the voters, the mortgage exemption proposal receiving the larger majority.

The constitution of Ohio provides that if two amendments are submitted at the same election and there is a conflict, the one receiving the larger majority shall be declared carried. The question of conflict was at once raised, and to settle the controversy the Ohio Taxpayers' League took the matter into the supreme court, believing that a decision would uphold the contention of the League that there was no conflict. Decision was rendered January 28th. Three judges held for the classification amendment and four declared that there

was a conflict, although the four did not agree that the conflict grew out of the same point. The three dissenting judges agreed with the contention of the League that there was no conflict between the classification proposal and the original uniform rule, because in the case of the mortgage exemption proposition the electors did not vote on the whole section as printed on the ballot but only on the amendment as indicated in black-face type.

An interesting side-light on the Ohio constitution covering supreme court decisions is that it takes the vote of six of the seven judges to declare a law unconstitutional, but that four of the seven can hold a constitutional amendment to be illegal!

The Ohio Taxpayers' League is now seeking to have the General Assembly, which is in session, submit another classification proposal to the people at a special election, to be held at an early date. The suggestion is meeting with the approval of the legislators and it is believed that an election will be held late in May or in June.

The rough road that classification has had to travel in Ohio has not been a bad thing for the principle itself. There has been so much popular discussion of the subject, and particularly so many editorial regrets over the final defeat of the proposition, that fair classifying will be far easier than it would have been had not the people been fully advised.

O. K. Shimansky
Secretary Ohio State Board of Commerce

AN ILLUSTRATION OF THE EFFECTS OF LAND TAXATION IN CANADA

A single illustration is sometimes of greater force than a book full of statistics, and how a tax system has worked out from the point of view of the interests of a single typical owner of real estate, may be more illuminating than the most elaborately formulated generalizations. Recently a man who lives in one of the principal cities of Western Canada, where he owns considerable real estate, was on a visit to New York, and in the course of a conversation regarding the special taxation of land in the Canadian west, revealed in confidence the detailed records of his properties—their valuations, their taxes, their income and their general expenses. These figures were so interesting that their publication was urged and consent was given to print the summaries. It is believed that the figures which follow are typical of a large number of persons who own city property in this region.

The individual is the owner of ten parcels of real estate. Six of them are improved and four unimproved. The assessed value of the improved properties for 1918 amount to a total of $960,400. The improvements (assessed at 66⅔ per cent of full value) amount in total to $134,800. Combining these figures and expanding the building assessments to full value, produces a total investment of $1,162,600.

The gross rents from these properties for the last year were $42,599, the expenses other than taxes and interest $22,327, making net rents of $20,272. The taxes were $27,322.

The assessed value of the four unimproved properties totaled $54,570. There was no income and the taxes amount to $1,395.

In other words, in the case of improved real estate, the taxes amounted to two-thirds of the gross rents. After the owner had paid the mere current operating expenses of the buildings there was not enough income from the property left to meet his taxes. To pay them it was necessary for this owner to draw upon other resources to the extent of over $7,000.

If this man owned his property outright the burden would be bad enough, but in this particular case the individual has an indebtedness of approximately a half-million dollars upon the property, and the interest on this sum must be added to the figures given above to indicate his true burden.

It may also be noted that the six improved parcels are on the whole exceptionally well improved; they are well located and are not over-assessed as compared with adjoining properties.

These figures display forcibly the result of land taxation when carried to an extreme and illustrate the dangers of a system by which the burden is made to fall upon a single class. The situation may well be considered by those in the various states who are considering ways and means of providing revenues and may serve to sound a warning against undue emphasis upon the taxation of real estate to the exclusion of other sources of revenue.

The third annual meeting of the Minnesota Tax Conference was held in the Old Capitol Building at St. Paul, January 15 and 16 and was attended by 300 delegates and others interested in tax matters. The interest shown was remarkable and many counties sent full delegations despite the fact that all had to pay their own expenses.

Following is a summary of the resolutions adopted: Exemption of household goods from taxation; adoption of county assessor system in place of the township system, and, should such a measure be enacted, an amendment to the constitution permitting a state income tax; removal of the discrimination between platted and unplatted property in the classified assessment law; requirement that the true consideration be stated in all deeds filed for record; increase in inheritance tax rates; and partial distribution of the gross earnings tax on railroads now retained by the state.

The resolutions have been transmitted to the tax committees of the senate and house and some of the proposals favored may be enacted into law at this session.

One of the program features was "The Model Tax System of the National Tax Association," by Samuel Lord, member of the Minnesota tax commission.

In the message of Governor Henry J. Allen to the Kansas legislature there appears a very urgent call for changes in the tax system of that state. His suggestions are much in harmony with the report of the model tax system committee of this Association, as appears from the following extract from his message:

"A model tax system is now before the whole country for consideration. The component parts of it are as follows: First, land classified according to its differing economic values; second, some kinds of tangible personal property also classified as to economic value; third, reasonable taxation of businesses; fourth, income taxation; fifth, inheritance taxation. Such needs to the Kansas system as the inheritance tax law, the income tax, legislative freedom in matters of taxation, so that the legislature may enact an equitable system, are obvious unless we desire to retain a method of taxation which is an absolute barrier to our progress."

A plan to accomplish more effective collection of delinquent taxes, which was suggested by Commissioner Plumley of Vermont in his *Biennial report for the term ending June 30, 1918*, has been carried forward by the introduction of a bill in the present session of the legislature. We understand that it has already passed one branch of the Assembly. This plan involves the centralized supervision of officials to whom delinquent taxes are turned over for collection by the regular tax collectors, and constitutes a beginning in a movement which should have important consequences. We have long neglected the collecting side of taxation. There is good reason for some standardization and centralized supervision of collections as well as of assessments.

The enactment of the new federal tax laws has created many difficulties in interpretation and enforcement. Among other agencies for the assistance of the taxpayer in his understanding of the law, is the series of six lectures to be given by Professor T. S. Adams at the New School for Social Research in New York City. A course is also announced by Columbia University in which, among others, Professor Robert Murray Haig, Mr. R. H. Montgomery, and Mr. George E. Holmes are to lecture.

The Association scores again in enjoying the distinction of having three of its members chosen for service on the "Advisory Tax Board" established by the new federal Revenue Act. Five of the six members authorized have been recommended. Of these, three are our members: Dr. T. S. Adams, who is named as chairman; Fred T. Field of Boston; and ex-Deputy-Commissioner Luther F. Speer.

THE FOUR MILLS TAX IN PROVIDENCE, R. I.

WALTER W. BURNHAM
Chairman, Board of Assessors of Providence

Prior to the enactment of the Tax Act of 1912 the state of Rhode Island had operated under a general property tax law which permitted towns and cities to fix the rate of taxation. The state received eighteen cents of each dollar raised upon the valuation of the year previous. There was no supervision by the state and no state tax upon corporations.

The law exempted from taxation stocks in corporations *liable* to taxation in other states and taxed resident owners of stocks in Rhode Island corporations upon the difference between the full and fair cash value of the shares and the proportional part of said value taxed to the corporation as real estate and tangible personal property. And said law further permitted the deduction for indebtedness from the personal property of corporations and individuals.

No law offered greater inducements to residents to invest outside the state and to corporations to carry indebtedness large enough to offset their taxable personalty.

The proposal by the commission which framed the Tax Act of 1912 to fix the mild rate of four mills upon intangibles and to allow deduction for debts only from credits, to exempt from local taxation shares in corporations liable to be taxed upon their corporate excess, to tax tangibles where located, to continue the right of towns and cities to fix the rate upon real estate and tangibles, and to reduce the state tax from eighteen to twelve cents, was regarded suspiciously by many wealthy people who habitually invested outside this state.

Corporations, too, showed extreme interest in the proposal that a state commission should tax their corporate excess at the four mills rate and that local assessors should tax their tangibles flat.

The Tax Act of 1912 was approved February 15, 1912, and Providence assessed its tax June 15, 1912.

Great curiosity was apparent among taxpayers. Opinion was freely expressed that owners of securities formerly exempt would shift to local securities exempt under the new law. It is a fact that the market for locals was excellent, but the fine thing is that locals have maintained their value continuously. Does it not show a better civic condition when money is invested at home?

Following is a table showing valuation of personalty under former law and under four mills rate:

Year	*Personal property valuation*	*Rate per $1,000*	*Amount of tax*
1911	$71,013,420.00	$16.50	$1,171,721.43

Year	*Tangible personal property valuation*	*Intangible personal property valuation*	*Rate per $1,000*	*Amount of tax*
1912	$52,185,900		$16.50	$861,067.35
		$61,6[illegible]4,520	4.00	246,738.08
1913	57,423,720		16.50	947,491.38
		69,090,920	4.00	276,363.68
1914	55,169,460		16.50	910,296.09
		77,004,120	4.00	308,016.48
1915	55,424,500		17.50	969,928.75
		77,818,840	4.00	311,275.36
1916	59,169,6[illegible]0		17.50	1,035,468.00
		84,050,840	4.00	336,476.16
1917	64,614,500		18.5[illegible]	1,195,368.25
		92,059,560	4.00	368,238.24
1918	72,562,0[illegible]0		18.50	1,342,397.00
		94,420,080	4.00	377,680.32

These results have been achieved with practically no friction and very little litigation.

It is an axiom in taxation that, if a taxpayer knows his neighbor should be taxed and is not, his grievance is not that he is taxed, but that his neighbor is not; that if there is inequality in taxation the grievance arises from such inequality alone. It was noticed that taxpayers were not aggrieved by the amount of valuation but by the amount exacted, so that it was possible to increase the amount of intangibles four times at least, in many instances, without exacting a greater tax.

Individuals voluntarily divulged large amounts of intangibles formerly untaxed, because of the four mills rate and expressed relief that they no longer felt warranted in secreting property. Taxation of intangibles by the state, formerly taxed locally, worked no hardship upon towns and cities. Under the former law savings deposits were taxable locally. Local asses-

sors having no authority were able to uncover but a small amount, while the present law uncovers to the state all savings deposits. As for taxing the proportional amount per share in local corporations, the process was simple after the owner was found out.

But the four mills rate does not alarm the shy and supersensitive taxpayer; he is impressed with its fairness; he notices that his neighbor who formerly loaned money on real estate collateral now records his mortgage or transfer. He even bows to the tax assessor. He now eagerly and successfully searches the tax list for his neighbor's name; gladly does he tender his cheque to the tax collector.

He recalls the former twinges of his conscience at the thought of being obliged to lie or pay $1.65 to $1.85 out of a $4.00 dividend, but now he exults in the knowledge that, although he owns shares in local corporations, they are tax free to him. He freely displays savings bank books, acknowledges ownership of bank stocks and all sorts of local securities, because he knows the state has taxed them all and for that reason he is called upon to pay less.

Truly wisdom has entered into unknown places and justice has overthrown discrimination.

This state after many years' observance of polite and unprofitable comity with her sister states now enjoys home rule, and finds her venture into the four mills tax profitable and satisfactory.

THE MINNESOTA CLASSIFICATION LAW

From advance copy of Chapter XIV of the Sixth Biennial Report (1918) of the Minnesota Tax Commission

The classified assessment law (Chapter 483, General Laws 1913) resulted in a most remarkable change in true and full value statistics. Prior to 1914 when this act became effective, the law required all property subject to ad valorem taxation to be assessed at actual value. As is well known, no serious attempt ever was made to comply with this provision, and the usual custom was to assess at from 25 to 50 per cent of what property actually was worth, the percentage depending largely upon the whim of the assessor and varying greatly even as to property of the same class in the same district. In 1912, the last real estate assessment year under the old law, the full value returns, and the assessed value as well, of all property in Minnesota were only $1,512,745,944. In 1914, the first year under the classification act, full value returns jumped to $4,231,407,200, a gain of approximately 280 per cent, and in 1918 the five billion mark was exceeded.

Reasons for Increase

The reasons for this increase are easily ascertained. Under the system prevailing prior to 1914 all taxing officials disregarded the full value provisions of the law and, as we said in Chapter 4 of our fifth biennial report (1916), there had been developed "a general system of undervaluation, a direct law evasion, that was winked at by local officials, and, finally, was openly sanctioned and approved by the legislature and state department heads."

The present law has to a great extent remedied this situation by both legalizing and standardizing the irregular practice of undervaluation which prevailed before 1914, and the old legal fiction and presumption that true and full value and assessed value correspond and are in fact identical has been done away with. Now the assessor determines in the first instance the full value of each article of personal property or tract of real property which he is called upon to appraise and extends his assessment thereof at percentages fixed by law, varying from 25 to 50 per cent in accordance with the statutory classification.

The requirement that full value be in truth ascertained as a preliminary step in the assessment is directly responsible for the rather startling full value increase already noted, and the resultant statistics have become valuable as an index of the wealth of the state instead of being, as under the old system, valueless for any purpose and in fact "without form and void."

Classification Act is a Success

If the classification act had accomplished no other reform than the establishment of a reasonably accurate full value appraise-

ment as an assessment base, its enactment would have been entirely justifiable. What has been accomplished in other ways through the enforcement of this law and a complete and detailed discussion of the reasons for its existence, as well as a history and commentary of the results attained during the first three years of its operation will be found in Chapters 3 and 4 of the fourth biennial report of this commission (1914) and Chapter 4 of the fifth biennial report (1916). The general observations in those chapters apply to the 1917 and 1918 assessments as well as to those of 1914, 1915, and 1916, and need not here be repeated. It seems sufficient to say at this time that the classification system has met with such popular approval, has been so generally successful in operation, and has become, after five years' trial, such an intimate part of our scheme of taxation, that it never will be abandoned while ad valorem taxation prevails in its present form.

The tax commission by this observation does not mean to convey the impression that the classification schedules in the present law are perfect, but only to go on record as favoring the taxation of property at certain percentages of full value, thus giving to the legislature an opportunity to classify types and varieties of property, assigning to each such part of the tax burden as may seem just and proper. When taxes are levied on full value, household goods bear the same proportionate burden as bank stock. Classification allows discrimination and differentiation, and the courts have given legislative authority a wide latitude in this direction.

Comparison Shows Critics in Error

Percentage assessments, even when such a system is prescribed by law, have been widely criticized by tax experts on the ground, among others, that full value will not be ascertained with any more exactness than is assessed value when it corresponds with full value, and therefore that by assessing at a fixed percentage of an admittedly erroneous full value the chance for unjust discriminations and unfair practices will be greatly magnified. The experience of Minnesota is a direct contradiction of this contention. In fact, we are firmly of the opinion that the equalized full value in this state, upon which the assessment is predicated, more nearly represents the actual value of the property to be taxed than does the full value in comparable states where strenuous efforts have been maintained during the last few years to strictly enforce full value assessments.

No Radical Action Taken

The Minnesota tax commission is well content to stand in support of its contention that the classification act of 1913 has brought about an improvement in assessment methods which has not been surpassed in any other state of approximately the same wealth. In several states where a determined effort is being made to assess all property at full value it has been necessary to resort to a program of drastic reassessments and considerable expense has been incurred in arriving at actual value and in keeping the assessment up to that mark from year to year. The results in Minnesota have been attained with little or no special effort of this character. The gain of 280 per cent in full value the first year of the new law over the full value returns for the last year when that value corresponded with assessed value came naturally and in the ordinary course of events. Outside of persistent and unremitting efforts by the tax commission to educate assessors and other tax officials in the proper discharge of their duties, no radical steps were taken to obtain these results and no particular attempt was made by the tax commission or other taxing officials to screw the returns up to the last notch. Since 1914 the increase has been steady and also has come without the necessity of employing any but educational measures.

Human Element Vital Factor

Now that we in Minnesota have established a full value basis which we believe to be substantially correct, it may be contended by some that we might well adopt this as the assessment. Such an argument overlooks the psychological or human element in the situation, which after all probably is more responsible for the beneficial consequences outlined than any other one factor or group of factors. When property is supposed to be assessed at its actual value in money the natural tendency is for both assessors and taxpayers to modify the strict terms of the law even when rigid enforcement is sought by some central author-

ity. Reassessments, prosecutions and other drastic remedies never have and probably never will eradicate the undervaluation habit as long as the law requires full value and assessed value to correspond. In our fifth biennial report, page 61, we said:

"The tendency on the part of the taxpayers to underestimate and undervalue is coincident with the history of taxation. It is not a modern political phenomenon, but rather a deviation from the straight and narrow path of common honesty so sanctioned by the custom of centuries and so ingrained into the very being and conscience of the worthy and unworthy alike as in a measure to remove it from the category of a moral lapse and establish it as a proper and justifiable evasion of the written law, an evasion which brings no reproach from society and which is so universal in character that the odium of falsehood does not attach to those who practice it."

Law Recognizes this Frailty

This is true today, always has been true and probably always will be true. Not only is the taxpayer actuated by this desire to undervalue, but the assessor is generally a victim of the same tendency. The classified assessment law of Minnesota recognizes this human frailty and the motive behind it; it recognizes the well-known fact that the average taxpayer believes that the lower the assessed value the lower his tax; it recognizes that a man with an automobile worth $1,500 is much more apt to admit its full value when he knows it is to be assessed at but one-third thereof, $500, than when he knows the assessed value and full value correspond; and finally it recognizes that the same feeling controls most assessors and that they would much rather value property at a fraction of what it is worth than at true value. The taxpayer is, under our system, permitted to delude himself if he so desires, by harboring the belief that undervaluation means less taxes. People are better satisfied in being allowed to follow hereditary customs. Assessors and other local taxing officials do not find it necessary to perjure themselves when they certify the rolls to be correct. Instead of harm being done, much good has been accomplished, and we think the full value statistics already cited are conclusive on this point.

The 280 per cent gain in full value came "over night" as it were, and we are certain that it would disappear with equal rapidity should it be decided to use it as the assessment.

Full Value is Itemized

One other objection to undervaluation as a system has been advanced. It is asserted that the resultant statistics do not give a correct idea of the wealth of a community. But in Minnesota full value data is available in every district for each item of personal property and each tract of real property listed. In addition, we are not of the opinion that those seeking investments or interested for other reasons in ascertaining the wealth of a city, village or township will pay much attention to assessed valuations, unless for legal reasons.

How Property is Classified

The classification law has remained intact since it was enacted in 1913. By its terms property subject to ad valorem taxation is divided into four classes. Iron ore, mined or unmined, constitutes class 1 and is assessed at 50 per cent of full value. Such property as household goods, wearing apparel and other similar articles used for domestic purposes forms class 2, assessable at 25 per cent of full value. In class 3 we find the great mass of personal property, such as live stock, tools, machinery, merchandise, logs and lumber, all vehicles and other property of a like nature and, in addition, rural (unplatted) real estate. Property in this class is assessed on a 33⅓ per cent basis. All other property, including urban (platted) real estate, bank stock, the poles, wires, conduits, tracks and other similar equipment of light, power and street railway companies, privately owned structures on government land, and elevators and warehouses on the right of way of railroads, will be found in class 4, assessable at 40 per cent of full value.

MOTOR VEHICLE TAXATION

HON. OLIN H. CHASE
Motor Vehicle Commissioner

A paper read before the Association of New Hampshire Assessors, December 19, 1918

The present situation reminds me of an episode associated with the congressional career of Hon. Joseph G. Cannon. When Uncle Joe was defeated for congress in 1912 he was succeeded by a man whose name was O'Hair. O'Hair was filled with ambition and a desire to represent his constituents according to their wishes, so after taking his seat he wrote to many of his voters asking their wishes with reference to pending legislation. Following is one of the replies he received: "Dear O'Hair: If you don't know any more than I can tell you, you better resign and come home."

My subject is motor vehicle taxation, but for the most part I have studiously avoided anything which could be by the most liberal interpretation understood to have any direct bearing upon that subject.

The advent of the taxation problem was coincident with the birth of civilization, and it promises to continue so long as the element of selfishness remains in human character and the law of self-preservation survives. To the study of the taxation problem men devote their entire lifework and then find it necessary to abandon the task unfinished. To the average person who gives the subject more than passing thought, difficulties present themselves unaccompanied by solution, and as a last resort they settle down to such comfort as they are able to extract from a vociferous cussing of the assessors and tax commission.

Reference to the tax commission calls to mind the story of the soldier who returned to barracks with two badly blacked eyes. One of his comrades inquired: "Why, Bill, where have you been? You've got two black eyes!" "That's nothing," he replied, "I could have had a lot more, only I had no place to put 'em."

Passenger automobile production in this country jumped from 515,000 cars in 1914 to 3,000,000 cars in 1917. The average mileage per car is estimated at 6,000 miles, making a total motor mileage of 18,000,000,000 for 1917. Assuming that the average number of passengers was three, we have for the total number of miles traveled by motor 54,000,000,000. The total mileage of railroad traffic for the same period was 35,000,000,000. When we add to the passenger travel the enormous light and heavy carrying business done by motor we have a total that makes even war drive figures seem small by comparison.

The increase in the number of motor vehicles and the different uses to which they are put has been so unexpectedly rapid that it is not strange that legislation has not kept pace with this growth either in the matter of police control or in imposing upon the motorist his just share, and no more than his just share, of the public burden; neither is it strange that there is a confusing lack of uniformity in motor vehicle laws when we consider that they result from the deliberation of 49 different legislative bodies. If justification for federal interference in matters commonly understood to belong to the individual states is possible, the automobile affords a well-defined instance. The automobile has so obliterated distance that a state is a no larger unit in its regulation and control than a town was in the days of horse-drawn transportation. In fact, it is possible for one to travel in more different states in a day with a motor-driven vehicle than it was towns when the horse was the railroad's nearest competitor, and every time he crosses a boundary line he becomes subject to a different law.

The position taken by the American Automobile Association is that the automobile is regarded essentially as a subject of class legislation and that multiple taxation prevails under various guises in a majority of the states. This organization says that supplementary to the fees required by the home state it frequently becomes necessary for the motorist to pay additional registration or license fees in order to comply with the regulations of other states through which he may make extended tours

or even repeat short trips for business or social purposes. They contend that these same travelers can cross any state line by some other means of conveyance and remain law-abiding citizens, but once they cross in a motor-driven vehicle they become potential criminals. This position is not wholly unbiased, yet it possesses something of merit.

The motor car, for purposes of taxation or from any other angle, can no longer in fairness be viewed as a luxury. While a part of a car's mileage may be expended in pleasure riding, the fact now stands forth that the automobile bases its claim for recognition on the ground that it serves an economical and essential purpose in conveying passengers from one place to another—a doctor to his patients, a salesman to his customers, a child to school, members to their churches, country folk into the city, and urban residents out to the country. In fact, the automobile serves modern requirements expeditiously and economically.

Many cases of heated controversy have arisen out of interstate relations in motor traffic. For instance, Maryland refuses to recognize the District of Columbia as a subdivision of the nation and exempts the Capitol City from the reciprocal privilege of use of their highways without registration, extended to residents of states granting like privileges to her citizens. In 1917 the Maryland treasury profited about $70,000 by this discrimination, but it did not conduce to a corresponding volume of good feeling toward the state of Maryland on the part of District of Columbia motorists.

There is pending in congress a measure known as the Pittman bill, which, had it not been for the sidetracking of much legislation through the exigencies of the war, would probably have been either passed or defeated before now. This bill provides in essential features that all self-propelled vehicles using the public highways shall be regulated by the laws of the state of the owner's residence with the condition that no person qualified under the laws of his state shall be required to take out registration or license in any other state in order to operate his vehicle in that state. In other words, the certificate of the proper officers shall be competent anywhere in the United States, but nothing contained in the bill shall be construed to exempt any person from police regulations of any state into which he may go. From the latter provision it will be seen that when this bill becomes a law, if it ever does, there will still be a serious deficiency, namely, lack of a universal traffic regulation. The foregoing bill would give to the motor car road users of this country the same liberty possessed by the automobilists of Great Britain, France, and other European countries, where they have gone to the extent of adopting an international plate of identity, recognized by all countries, which is obtainable at a moderate cost.

Some there are who go so far as to question the constitutionality of exacting a registration fee in another state for a car already registered in the state of the owner's residence. These opponents of dual registration base their contention upon article IV of the federal constitution which is in part as follows:

"Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restrictions shall be laid by any state, on the property of the United States, or either of them."

I personally believe that it is time for comity between the states in the matter of motor vehicle registration; that a country-wide, year-round motoring reciprocity is desirable; that with the multiplying quantity of interstate passenger car travel and motor truck transportation the highways of the country should be open to the road traveling vehicles of all states as long as the home state number plate is carried for identification purposes and each state is allowed to regulate the amount and the use of the fee charged for such plate.

In 39 of the 48 states motor vehicles are taxed as personal property; in the other nine states the registration is in lieu of all taxes.

In every state, with the possible exceptions of Wisconsin and Wyoming of which

I have no knowledge, the proceeds from motor vehicle registration are used on the roads either for construction or maintenance.

In twenty-eight states motor vehicle registration is handled by the secretary of state, in eight by the highway department, in California, Connecticut, Kentucky, Maryland, New Jersey and New Hampshire by a separate department, in Florida by the comptroller, in Kansas by county treasurers, in Tennessee by the clerks of court, in Arkansas by the commissioner of state lands, in Mississippi and Texas by the county tax collectors, and in Alabama by the probate judges. There is something strikingly suggestive about the latter arrangement. By the same token the bankruptcy court might be an appropriate agency to handle motor vehicle registration.

The fees charged for registration cover a wide range. A resident of Minnesota who purchases a Ford, for example, may register it for three years for $5.00, while a resident of New Hampshire would be obliged to pay $45.00 in annual installments of $15.00 each for the same privilege; and a Vermonter under the same circumstances would be assessed $22.00 the first year, $16.50 the second year, and $11.00 the third year, and the same amount for each subsequent year.

In the Panama Canal zone the fee is $5.00 and the receipts from motor vehicle users are treated as a part of the revenue from the Panama canal.

The present motor vehicle law in New Hampshire, with the exception of minor amendments, was enacted in 1911. In 1912 the gross receipts amounted to $117,316; for the year ending August 30, 1917, the amount received was $422,064.84; and for the fiscal year which closed August 31, 1918, the receipts were as follows:

Automobiles, resident	$389,228.04
Automobiles, non-resident	11,239.00
Operators, resident	33,810.85
Operators, non-resident	888.00
Chauffeurs, resident	21,843.00
Chauffeurs, non-resident	388.00
Dealers	10,130.00
Motor cycles	4,913.50
Neutral zones	851.00
Fines	7,781.23
Plates	947.60
Certificates	380.00
Total	$482,400.22

Subtract from this $53,963.01, the cost of running the department, and there is left $428,437.21, the amount available for the highway department.

It is not far from correct to say that there are 26,000 automobiles owned in New Hampshire. Taking the figures of the last census as the state's population we find there is owned in the state an automobile for every 17 inhabitants.

The following traffic census figures from the forthcoming report of the highway commissioner are of interest. The census was taken on the same seven consecutive days in the months of June, July, August and September, from 8:00 o'clock a. m. till 8:00 o'clock p. m. each day. On the Merrimack Valley road the heaviest traffic was found at Nashua. The average number of vehicles daily was 1,000, of which 5 per cent were horse-drawn vehicles, 10 per cent motor trucks, and the balance of 85 per cent was divided about equally between New Hampshire and foreign pleasure cars. On the East Side Road below Newington the average was about the same as the highest point on the Merrimack Valley Road—1,000 per day—divided as follows: 5 per cent horse drawn, 6 per cent trucks, 15 per cent New Hampshire passenger cars, and 74 per cent foreign cars. Above Portsmouth the highest point was at Conway, where the average was 600 vehicles daily. The highest point on the West Side Road was at Bethlehem, where in one week in August 10,443 vehicles were recorded. The average number of trucks daily was 100, horse-drawn vehicles 200, New Hampshire cars 450, and foreign cars 300, making an average daily total of 1050.

The east and west travel showed much smaller figures. The average over the Central or Claremont to Dover road was some over 400. On the South Side Road, between Manchester and Portsmouth, the average was 281 per day, and between Nashua and Milford a daily average of 350 was reached.

The automobile registrations in this state for the calendar year 1918 number 24,800 in round numbers. In addition to this there have been issued over 1600 pairs of dealers' plates. In 1917 approximately 22,000 registrations were issued, yet on the first of April, 1918, the assessors found for purpose of taxation only 12,404 carriages and automobiles which were assessed for

$8,146,519. In 1916, 17,508 registrations were issued, but the following April only 11,151 cars were returned for taxation. As we go backward in the figures a consistent discrepancy between the registration and the inventory appears, which indicates that there are a surprisingly large number of automobiles in New Hampshire which do not exceed $100 in value.

Thus it is readily seen that the motor vehicle adds to the ever present and perplexing problem of how to make it impossible for any citizen or group of citizens to escape his or their fair contribution to the public treasury. The present speaker has nothing to urge either for or against any specific measure calculated to remedy existing discrepancies, as the problem is not within the purview of the motor vehicle department.

TAXATION OF INCOMES IN NORTH CAROLINA

Letter of A. J. Maxwell to Governor T. W. Bickett as Chairman of the Special Tax Commission of North Carolina, October 22, 1918

It has been a matter of surprise to me that in all the discussions of constitutional changes we have had in this state there has been no suggestion of repeal of the one clause in it that to my mind is most out of joint with the times in which we live, and the repeal of which would in my judgment meet with the strongest public approval, if submitted, and that is the prohibition of taxing incomes derived from property, or unearned income. This provision of our constitution is as follows:

> "The General Assembly may also tax trades, professions, franchises, and incomes: Provided, that *no income shall be taxed when the property from which the income is derived is taxed.*"

It will be a long time before the opinion of Premier Lloyd George will fail to pass current in any company that can fairly appraise statesmanship. Before the exigencies of the present war he stated as a conclusion that had found universal acceptance that *unearned* income should be taxed — not equally with earned income — but at a *higher rate* than *earned* income. Since this memorandum was prepared our own Secretary McAdoo has insisted that in the preparation of the new federal revenue bill there should be a differential of 3 per cent in the tax on unearned incomes, or that the tax on unearned incomes should be 25 per cent greater than the tax on earned incomes.

Our method of handling income taxation is to tax *earned* incomes—that which is the product of the personal toil, the personal skill, or the intellectual achievement of the citizen, while we stand under this prohibition of levying *any tax at all* upon that class of income which comes through no personal effort but which flows as the natural result of the ownership of property.

We have in this state the citizen whose personal income from ownership of property approximates a million dollars per year, which we leave, as I mean to demonstrate before I am through, *absolutely untaxed*, while we tax the modest income of his secretary, his engineer, his lawyer, his doctor, and every employee whose salary exceeds $1,250 per year.

We tax a class of incomes which impose a real burden upon those taxed, but do not yield large revenue, and leave untaxed the class of income that could be paid without personal sacrifice and that would yield abundant revenue.

I have a full share of reverence for "the wisdom of the ancients." Generally they builded wisely with the material at hand, and with due deference to the wisdom of experience behind them. I can find much in the conditions of the past to justify the false philosophy upon which this provision of our constitution was founded. Property consisted largely of unproductive and uncultivated lands. That which was cultivated was made to serve mainly the personal needs of the owner, and when the property was taxed the owner was taxed.

That is absolutely not true of property in general today. Taxes do not apply against the *owner* of the property, but against the *user* of the property, or against the one who in the last analysis uses the product of the property. The tax against property is a tax against the owner so far, and only so far, as the property is used personally by the owner. To the extent that the man of wealth uses a more costly home, furnishings, automobiles, etc., and

returns them for taxation, to that extent he pays a larger property tax than his neighbor. But as to all of his property that is successfully put to the production of income, the tax is paid by those who use it or who use its product.

The tax upon a cotton mill is just as much a part of the expense of operation of the plant, that goes into the cost of producing its product, as the cost of the coal that feeds its boilers, or the labor that runs its machinery, and goes into the price of its product and is paid for (with added interest) by those who purchase its product. The tax is no more a personal charge against the owner than is its coal bill, its labor bill, or any other expense of its operation.

This rule will hold true of all property that is successfully put to the earning of income and to the extent that it is taxed equally with other property competitive with it. The composite tax rate in the city of Raleigh is 2⅔ per cent of assessed value of the property. Who pays this tax upon rental property — the owner or the user? To ask the question is to answer it. Would any one contend for a minute that rentals are not made sufficiently high to cover the taxes in addition to a fair return on the property? If the necessity should arise for doubling this tax, would not rentals be raised to meet the increased tax and perhaps leave the landlord a little extra stipend to salve his feelings for the additional tax he was passing on to his tenant? Yet we tax the modest salary income of the tenant and exempt the unearned income of the landlord, and the untaxed landlord gets his exemption upon the payment of a tax which the taxed tenant furnishes him the money to pay.

This principle that the user pays the tax on property is of such universal application that it has been said, and I believe with exact accuracy, that there are only two forms of tax that cannot be passed on down the line to the purchasing public—the personal income tax and the inheritance tax. The accuracy of this principle is so well recognized in Wisconsin that they not only tax the income of the landlord, from property, but they charge the landlord with income on the rental value of his own home to equalize the tax equity as between home-owners and home-renters.

The personal income tax hugs the person against whom it is assessed. He can find no way to shake it off. It applies against a privilege personal to himself. A scheme of taxing incomes that exempts the income that *earns itself*—that income which represents the natural increase of property—while taxing *earned* incomes, is shockingly inequitable and should not be permitted to continue. If we cannot find the means of taxing unearned incomes we ought to extend our exemptions to cover earned incomes.

In my opinion our income tax should be extended to cover income from all sources against persons and corporations, and used as a substitute for so much of the general property tax now levied for state purposes as cannot be made up from other sources of revenue.

By universal consent the general property tax is relied upon as the main source of county and municipal revenues in all states. It is subject, however, to one fundamental infirmity that will always, and under the most scientific methods of administration, stand in the way of its ability to carry the total revenue needs of state, county, and city; which will always defeat the purpose to require every citizen to contribute to the support of government in proportion to his prosperity; and which makes necessary an auxiliary support that the income tax is almost perfectly fitted to meet.

The general property tax depends first upon an appraisal. The appraisal of value must be made with reference to its earning capacity, and here we meet its incurable infirmity. Earning capacity is a highly speculative element, and as tax administration must always be conservative, its probable earning capacity in the future is discounted by every element of chance and value is appraised upon what would be found as its assured, or minimum, earning capacity.

No principle of science has yet been found by which we can look into the future and discover where and when unusual profits are to be made. Following a general rule of averages, it is about as likely to come to the industry that is having its period of depression today. But as it is presented to the tax assessor nearly all property has misfortune behind it, with it, or just ahead of it, which must have its influence upon the value placed upon it for

future taxation, and the valuation pace is set by the cripples in the race.

The disposition to give the property owner the benefit of every possible doubt is well illustrated by the familiar instance in every city where some citizen has held a tract of land off the market until the city had grown up around it. In spite of every admonition from supervising authority, and with full knowledge of its enhanced value, local assessors continue to assess it as farm lands, until finally sold off in lots, at from ten to a hundred dollars a front foot, and the proceeds invested in non-taxable securities or some form of intangibles that could be secreted from the taxlister. The same kind of treatment is accorded the most prosperous business in the community. The more prosperous it may have been the more it will be contended that its previous prosperity was abnormal and could not be expected to continue, and could not, therefore, be fairly used as the basis of appraising its value for the future.

The owner is given the benefit of every doubt, and, to state it in the most conservative terms, the public loses the right to participate in any abnormal or speculative earnings. Under this system the persistent tendency is for *prosperity to go untaxed;* the richest part of the harvest escapes the tax gleaner. The general property tax can't reach it, and we are not permitted to reach it through an income tax.

As an instrument for taxing a fair proportion of prosperity, the income tax is as much superior to the general property tax as hindsight is superior to foresight, or, as an ascertained fact is superior to a poor guess. The genuine income tax doesn't speculate; it doesn't look to the future; it attaches itself to the achieved result; it plays no favorites; it commits no wrong; it leaves untouched the unfortunate; it is generous with wealth that for the time is unproductive; but it exacts its full toll where and when fortune favors, and permits the state to share, in equitable proportion, in the prosperity of her people.

The reasoning that taxes levied upon income-producing property are paid by the user, rather than the owner of the property, is as sound as any law of economics, and would justify the taxing of the income of the owner in addition to the tax upon the property paid by the user. But even if this reasoning should not meet the assent of the public mind, there can certainly be no sound objection, upon grounds of double taxation, to the taxing for the state of the income derived from property if at the same time we exempt the property from its payment of state taxes, and leave it to carry only its part of the burden of local taxes. Indeed it may be seriously argued that this may be done even under the existing constitutional prohibition of taxing income derived from property taxed, upon the construction that the income cannot be taxed if the property from which derived is taxed *for the same purpose*, and that, if the property is relieved from state tax, an income tax for the state may be substituted for it. However, it would probably not be safe to launch out upon such a new course of taxation without removing this prohibition from the constitution.

There has been for several years in this state a recognized need for relieving real estate of the burden of supporting both state and local governments. This combined burden has had the effect of running tax rates to unreasonable limits and has been found to be a substantial difficulty in the way of getting real estate properly assessed. Local communities have found the state tax upon real estate a sufficient excuse to hold down assessed values to such small percentages of real value as to threaten the whole structure of ad valorem taxation.

Without in any way weakening the protection of the general principle of our constitution of taxation by a uniform rule, applying alike to all property and to all the people of the state, we can by this means leave to the local communities all the revenue from their physical properties, including the physical properties of private and public service corporations, and at the same time provide, through the means of this income tax, applying to income from all sources, a sufficient volume of revenue, supplementing the receipts from privilege, license, franchise and inheritance taxes, to meet generously the needs of the state government. The income tax, unrestricted except by a nominal exemption, can be made to yield any desired amount, within reason, depending upon the rate and graduation of the tax, the amount of exemption, etc.

The income tax could be made to cover the unearned increment in real estate values by a legislative construction that all profit from the sale of real estate should be

deemed to be income for the year in which sold, and such profit returned for income tax.

Adoption of the income tax as a substitute for the general property tax for state revenue would permit the state to get revenue from the foreign corporations doing business in the state. A large number of the most important manufacturing enterprises in the state are organized under charters from Jersey or some other state, so that under our general property tax we cannot assess their capital stock for taxation, and this results in quite a discrimination against those manufacturing enterprises which are organized under our own state laws. But while we cannot reach the capital stock of such corporations for ad valorem taxation, under an income tax law we could tax so much of the income of such corporations as was earned in this state, and from this source alone a very considerable part of the revenue now received by the state from its tax on property could be made up, and upon a basis that would be exactly fair as between domestic and foreign corporations.

The state income tax is growing in favor with recognized authorities on taxation as the soundest method of relief from intolerable rates of the general property tax, and as furnishing an auxiliary support to it that is sound in every particular. With moderate rates of exemption it would take its contribution from every class of citizen in every community having an income above that necessary for actual support, and grade the tax in direct proportion to his prosperity. In Wisconsin, where since 1911 they have taxed income from all sources, the personal exemptions begin with $800 per year for the unmarried; $1,200 for husband and wife, and $200 additional exemption for each child under 18 years of age. The Wisconsin income tax rate graduates from 1 to 6 per cent, reaching 6 per cent above $12,000.

Our neighbor state, Virginia, has adopted a tax upon income from all sources in its new scheme of taxation, with personal exemption of $1,200; for husband and wife, $1,800, and for each child under 21 years of age $200.

It seems to me that this policy would leave us but one very perplexing problem, and that is the problem of taxing intangible personal property. This has been the most perplexing problem in every state. It is the rock upon which the ad valorem system breaks with greatest force, and almost literally falls down. Experience is practically universal that this class of property —intangible, easily concealed, and with income limited to a low level—will not submit itself to the high rates of the general property tax and that it will find some way of avoidance even when the most drastic measures of "search and seizure" are resorted to. An infinitesimal part of it finds its way on the tax books. The local communities would lose but little revenue by releasing it from local taxes, and could well afford to do so in exchange for the release of all real estate and tangible personal property from state taxes. It should be exempt from the general property tax either by authority of constitutional amendment or by the expedient of leaving from the tax abstract, which the taxpayer is required to return, any inquiry as to property of this class; and there should be substituted for it a tax upon the income derived from such property, at such rate as would constitute a fair contribution to government by such property. This income should go to the state. This method has been adopted in a number of states with results that have been highly gratifying, both from the standpoint of largely increased public revenue, and of the distribution of sources from which received, so that only a moderate tax was imposed upon any one. As a substitute for all other taxes on this class of property the income tax rate should be about 10 per cent of the income, without exemption, which would be equal, upon 6 per cent paper, to a rate of 60 cents per $100 of par value, or about 25 per cent of the present combined rate in municipalities.

Let no man say again that North Carolina is a state where poverty abounds. Wealth has been accumulated so rapidly that it presents a serious problem if we are not prepared to use it wisely. The state tax commission gets a comprehensive view of this rapid growth of wealth in confidential reports that would thrill the public mind if visualized before it. We have become a wealthy state.

We have a very striking exemplification of this conclusion in the recent report by the treasury department that the federal government collected seventy millions of dollars in revenue in North Carolina the

past year. This sum is about equal to that which the state government of North Carolina has collected for its own uses from all revenue sources in all the years since the Civil War combined. The federal government collected more revenue in each one of several counties in this state last year than the state government collected in all the counties in the state.

But with all this production of wealth the state treasury still finds it difficult to make both ends meet, while it meets in a way grossly inadequate the proper demands of its institutions established to serve the needs of a rapidly growing state. We cannot adequately or equitably tax this prosperity under tax laws that limit us to an appraisal of the basic value of the property that earns this wealth. We need to adopt, as auxiliary to it, this principle of taxation that leaves speculation to take care of itself, and which attaches itself to the accomplished result and takes its toll of the money that actually comes into the till.

The state is not maintaining the growth of its institutions and agencies of service with that of the wealth and progress of her people. This should be a matter of concern to all our people. The time is rapidly approaching when the people, in their prosperity and progress, are going to be ashamed that the state is not measuring its progress in education, in benevolences, and in its agencies of helpful service, with the material prosperity of her people.

After-the-war conditions will place new responsibilities upon us. Certainly we must go forward with a comprehensive program of public health protection, public road building and other public improvements and with enlarged and improved educational facilities. Wealth will be a blessing to us only in proportion as we use it to serve worthy ends and purposes.

It will not be any problem to raise enough revenue, in this wealthy and prosperous state, if we can find the means of meeting the demands of equity and fair-dealing in raising it. The first requisite is tax laws that our consciences can approve.

We can render the state no greater service than in laying the foundation for adequate revenue for its progressive future upon sound principles of equity.

The tax program herein suggested would give us "the simplest, most logical and most satisfactory of all solutions"; would unfetter local communities in giving to them all of the proceeds of the general property tax, and leave to the state an unfailing source of revenue, levied upon lines of exact equity, and limited only by the prosperity of its people.

It should be further borne in mind that this limitation in our constitution upon the taxing power of the state was put there when the revenue needs of the state were simple; when public supervision of sanitation and health conditions had not been thought of; when there was not a public road tax in any county in the state; when public education had not been in fact recognized as a public obligation, and many years before there was a public graded school in the state. It has no place in the organic law of the modern state, and should be removed at the first opportunity.

The governing section of our constitution on taxation now reads:

"Laws shall be passed, taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and, also, all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises, and incomes: *Provided*, that no income shall be taxed when the property from which the income is derived is taxed."

This section should be changed to read:

"Laws shall be passed taxing, by a uniform rule, all real and personal property, according to its true value in money: *Provided*, the General Assembly may tax the income from credits, bonds, and other intangible personal property, in lieu of all other taxes on such property. The General Assembly may also tax trades, professions, franchises and incomes."

SOME PROBLEMS IN CONNECTION WITH FULL VALUATION

SAMUEL T. HOWE

From an address before the Assessors' Conference at Baton Rouge, Louisiana, January 6, 1919

PART I

It was with some misgiving that the invitation to address this important conference was accepted.

A citizen of one state can seldom speak with full confidence upon the internal affairs of another state some distance away, and particularly so in respect of a state which has institutions peculiarly differentiated from those of his own state. Naturally a knowledge of the customs and practices of the other state will lack more or less in precision, and, therefore, if anything is said on this occasion which appears to be nothing to the purpose, it is trusted that any such expression will be ascribed to an excusable lack of information. However, with regard to the value of property for tax purposes it appears certain that all states have much in common, especially states which have the general property tax, the design of which is to include in the tax base all goods or things subject to ownership, except such as are exempted by the constitution or the laws.

In any state where the constitution limits the power of the legislature so that it must provide a proportional tax, in other words the general property tax, the problems of taxation are quite different from those which appear in states where the legislature has freedom to act and so may classify property according to its differing economic characteristics and establish differential rates for the classes with the result of providing a system which is more equitable than the other system because there is opportunity to lay taxes according to the ability of the citizens to contribute to the public fund. In such a state there may be progressive taxation, the fairness and justice of which is agreed to by economists and expert tax authorities with few exceptions. This means that the rate of levy may be increased upon each successive accumulation of a stated amount of property provided ability has thereby increased. It is common knowledge that the federal congress in financing the war has applied this principle quite extensively.

In the less favored states where the tax cannot be placed strictly according to ability, the problems come out of the just proposition that the burden shall be placed among the citizens in a relatively equal manner. So long as the tax base consists of all kinds of property to be assessed by the ad valorem plan, the assessors have both the legal and the moral responsibility of seeing that the taxable property of every owner is assessed according to the standard of value fixed by law, and to this end they should labor intelligently and diligently to get all property on the assessment roll which the law subjects to the burden.

If the situation in Louisiana is at all like the situation in other states that have the same system, the so-called general property tax is fast becoming a tax on real property only, because of the constant increase in the value of intangible personalty which cannot be put upon the roll save with the consent of the owners. It goes without saying that where a large number of intangibles of great value escapes sharing in the burden there is always injustice to all property owners, and especially to those who list intangibles; but this is, of course, a matter for the legislature, which possibly may not be able to remedy the situation fully until the fundamental law is changed. In such cases assessors will discharge their function in a proper manner when they assess according to the legal standard of value all property which by unremitting industry they succeed in getting returned for assessment.

In at least one respect Louisiana has an advantage over some of her sister states in having the parish — in other states the county — as the unit assessment district, whereas in some other states the unit district is a subdivision of the parish or county district. It will be obvious to any one who looks into the question that always will it

be much easier to co-ordinate upon a given plane of value the work of 70 persons in control of the assessors, which number it appears you have in Louisiana—including the Parish of Orleans—than is possible to harmonize in some of the other states the work of assessors numbering sometimes as many as 2,000 whose tendency is to work independently of one another and who are subject to no positive control. In Louisiana, co-operation between the parish assessors and the Board of State Affairs could bring about an equality in assessments which would be more difficult of attainment in states even where the central authority is empowered to supervise and in certain ways to control local action.

No fair-minded person can object to the proposition that all property owners should have exactly equal treatment before the law, and justice in this regard depends almost entirely upon the work of the assessors. Assessment is the fundamental proposition, and unless relative equality is there obtained it can never thereafter be reached.

Not in any sense as a criticism is it suggested that one feature of the Louisiana system seems anomalous. It is that which permits the parish authorities to fix as the tax base any percentage above 25 per cent of the actual value of all property in the parish as legally determined by the Board of State Affairs. The result is of course that the tax base among the parishes may be widely varied, ranging anywhere from 25 to 100 per cent of the legally established actual value.

Not of necessity will this plan result in unequal taxation among the parish payers of local rates, but apparently there come out of such a situation complications and unnecessary official work and expense which might otherwise be avoided. Nevertheless it appears clearly that injustice might very easily occur in cases where two or more parishes combine to form a larger district, the parishes having widely differing percentages of actual value as the base upon which a flat rate of levy is placed alike. Clearly in such a case the parish unit of the larger district which has the higher percentage of actual value will pay more than its fair share of the tax of the larger district. This will be true as to any district, parts of the area of which are in two or more other districts having different percentages of the standard and upon which varying assessments, a flat or fixed rate of levy is applied.

It seems not out of place here to suggest that the policy which obtains in many states of incorporating in the constitution or the law a fixed rate of levy for any purpose is not in line with just taxation. Maximum limitations upon levies are desirable, but even then it seems clear that the public interest will be better conserved if there be some process whereby rates can be made flexible to meet varying conditions; because in the broad area of a state what may act suitably in one part may not be at all desirable in other parts owing to differences in their physical, climatic or industrial features which impress upon property in different communities widely varying economic values. Some central authority should have power to permit variations from any hard-and-fast rule which, if applied rigorously, will work injustice to many taxpayers.

Not infrequently unjust burdens are placed by reason of some statutes being interpreted in different ways by the authorities of different political subdivisions. Law-makers as a class are not more skilful in using words correctly and clearly than is the average person. Many statutes are enacted each of which may be plausibly invoked to sustain two or more different contentions. The ambiguity and many-sidedness of some laws, caused by their ungrammatical and inartistic construction, furnish occasions for the arbitrament of courts, and it is not until the contesting of a statute has reached the court of last resort that the final rule is derived for uniform application throughout the entire state.

The decision of an inferior court the jurisdiction of which is confined to a limited part of the state, until passed upon by the highest court provides a rule for observance only in a limited area, and experience shows that inferior courts pass differently upon identical questions.

The need of a speedy state-wide settlement of many contested tax questions growing out of statutes as yet uninterpreted by the highest court necessitates giving authority to some central tribunal to establish rules which shall operate state wide until the disputed questions are passed upon by the court of last resort. Thus in states which have central bodies in control of as-

sessment and taxation, whether they be tax commissions or similar bodies otherwise named, power of this kind is usually given them.

Upon the foundation laid among the individual taxpayers is built up the whole system; therefore equalization among them is the proposition of first importance, and this equalization can never be obtained except through the work of the assessors.

In no sense can it be expected that equalization by local boards of review or by state boards will result in the removal of inequalities among individual taxpayers. Such boards may equalize bulk values among districts and thus require a percentage to be added to the assessment of each individual, but by no means does this remove inequalities among individuals resulting from the work of the assessor.

These boards can also remedy grievances of individual taxpayers upon complaint or appeal, and usually their sessions are consumed in doing this kind of work. But always there are many citizens who have not a sufficient knowledge of remedies provided by statute to enable them to proceed in the proper manner, and thus through neglect caused by ignorance of special features of the law they sleep upon their rights and lose out. The controlling spirit should be to treat all property owners equally so that finally there will be no discrimination as between those who complain and those who have like cause of complaint but are not relieved because of their lack of knowledge of how to proceed to obtain remedies. The reason review boards are inefficient as indicated is because they do not have the time nor the facilities to acquire a knowledge of the value of all single items of property throughout their jurisdictions to the extent required to enable them to do justice among individual taxpayers.

Thus the work of the assessors is undoubtedly first in importance. Their action touches the individual purse rightfully or wrongfully, and surely in this respect their function is superior to that of any other officer considered in connection with the material welfare of the tax-paying public.

If the matter is rightly understood, some of the other states have an advantage over Louisiana in that the other states have central supervision and control over all assessments and can direct assessment work over the entire state upon lines which will produce uniform values among the individuals of the whole state. A central body properly authorized can always secure more uniform work over a state than will result from a number of assessors each of whom is a law unto himself and who works independently of all others.

The most weighty reason why, under the general property tax, actual value in money should measure assessments is because it is required by law. In all states that have the ad valorem plan of assessment there is this requirement. Even in the fewer than half dozen states which authorize as the tax base some given percentage of actual value, it is necessary first to determine what is the value which must conform to the legal standard provided.

The fundamental proposition is always that the burden of the tax shall be distributed in an equal manner. The moment the legalized standard is departed from, then and there inequalities among the taxpayers begin to show up. Administrators of law should of all others hold up to public view the fact that the statutes which they administer have been followed. When an officer varies from the law for any purpose whatever he violates the statute and also his official oath; and therefore has subjected himself to the law's penalty and has acted wrongly and immorally. If one statute be violated by him, his example sets the pace for others to do likewise and a step has been taken toward a no-law condition, and in effect this is the beginning of anarchy.

In a state the whole people make the laws through their chosen representatives, and there is absolutely no reason why any officer charged with administering law should himself assume the legislative rôle. When a laxity in law observance is once introduced into a state, and partcularly so by the administrators of law, the illegal and improper practice is soon extended to the boundaries of the state.

It is probable that the greatest cause of undervaluations is in following precedents. The practice may have existed for years by each successive administrator following in the footsteps of his predecessor, justifying himself by the thought that it has long been the custom, and so he sees no reason why he should make a martyr of himself by going against a proposition which, although wrong legally and in principle, has not

been seriously objected to by the people. The inclination of assessors to follow the line of least resistance is one of the main factors in continuing the practice of under-assessments.

There is usually a clear distinction between the results accomplished by administrative officers considered in connection with the manner of their selection. It is not intended, of course, to cast any reflections upon the assessors of the state of Louisiana. It is known that they are elective and it is assumed that they took their offices with the deliberate intention of complying with their oaths of office which requires them to observe the mandates of the constitution and the law. What is said is for the purpose of suggesting that it would be better even for them if they were selected by appointment rather than by election, and is said for the further reason that when the subject is discussed in a general way it seems always proper to point out wherein systems may be improved. Experience and observation, however, is most certainly convincing that generally appointive officers get better results in some lines of public work, and especially in matters connected with taxation, than do elective officers.

The appointive officer is removed from the direct influence of those wealthy and influential property owners who do not hesitate to bring pressure to bear for the purpose of being benefited personally at the expense of others. An appointive officer may be chosen under some method of civil service examination whereby is insured a possession of the necessary qualifications for the work. On the other hand, the voters at the polls when they choose an officer seldom if ever cast their votes having in view the qualifications of the persons for whom they are voting to discharge the duties of positions to which they aspire.

Elective officers who are dependent upon votes for their continued tenure in place are undoubtedly subject to greater attempts to unduly influence them in their work than are appointive officers; nevertheless, the refusal by any officer, no matter how chosen, to be influenced by importunities of the kind brings its own reward of self-satisfaction and in due time will have the approbation of the public.

Equal treatment of all taxpayers can be produced only by an observance of the legal standard of value. Just the moment the standard is varied from, inequalities begin to creep in, and unless checked in some manner, continue to increase in number and in gravity so that the practice when followed for a series of years is productive of the grossest cumulative injustice among individual taxpayers.

[TO BE CONTINUED]

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

RIPARIAN GRANTS.—In a recent case the United States Supreme Court has passed upon the taxability of lands held pursuant to a riparian grant. The questions involved in the action as originally brought were (1) whether the grantee was an owner in the sense that he was taxable for the lands granted; (2) whether the compact between New Jersey and New York approved by Act of Congress of June 28, 1834, made the territory involved subject to the jurisdiction of New York, and hence a tax levied by New Jersey was without due process; (3) whether the lands were within the taxing district of Jersey City (where the tax was levied), and (4) whether the lien of the taxes had expired.

The court observes that since the institution of the suit the second question had been decided adversely to the taxpayer (*C. R. R. Co.* v. *Jersey City*, 209 U. S. 473); that questions three and four had been satisfactorily dealt with in the opinions of the Circuit Court (189 Fed. 479) and the Circuit Court of Appeals (208 Fed. 854). Thus the point determined is the first—whether the grantee had a taxable ownership or whether the state was the owner. The nature of the estate which passes under a "riparian lease" had been held by the court of last resort of New Jersey to convey the entire estate to the grantee; the interest remaining in the grantor was held not an actual estate but a right of entry for non-

payment of rent and the lands in question were held not lands belonging to the state within the meaning of an act limiting the power of a railroad to condemn lands (*Hudson Tunnel Co.* v. *Attorney General*, 27 N. J. Eq. 573, 578). Similar holdings had been made by the Supreme Court of that state (*Cook* v. *Bayonne*, 80 N. J. L. 596; *Ocean Front Imp. Co.* v. *Ocean City Gardens Co.*, 103 Atl. Rep. 419). The court expresses its acceptance of the doctrine of these cases as well founded in reason and authority, and holds the lands taxable under the New Jersey laws.—*Leary* v. *Jersey City*, U. S. Sup. Ct., Jan. 7, 1919.

License Tax—Interstate Commerce—Isolated Transaction. — The sale of two cans of toilet cream was the subject of examination by the United States supreme court to ascertain whether such sale, without a license required by a municipal ordinance, rendered the seller properly subject to conviction and fine imposed by the state court (192 Mich. 462; 158 N. W. 865). It appeared that the person was regularly engaged in the sale of goods upon orders given him by customers, which orders were filled from shipments from his principal in another state. The two cans of toilet cream apparently were left over in stock and hence had "come to rest" in the state before the sale. It was urged that the application of the law should be determined by the general course of business and not by an isolated transaction; but the court, while admitting the force of the argument, held that the construction of the statute was a matter for the state court, and that as that court had construed it to apply to and forbid the act, the judgment must be affirmed.—*Watters* v. *Michigan*, 248 U. S. 65.

License Tax — Equal Protection.— The validity of a Kansas statute (L. 1915, Ch. 371) forbidding the sale of farm produce on commission without an annual license to be procured upon a proper showing as to character, responsibility, etc., and a bond conditioned to make honest accounting, has been upheld as not class legislation but designed to prevent certain evils. It was held not to transcend the limitations upon the powers of the states concerning matters of this kind.—*Payne et al.* v. *Kansas*, 248 U. S. 112.

Excess Profits Tax Not an Operating Expense.—In connection with authorizing the Hope Natural Gas Company, which, besides being engaged as a public utility in furnishing natural gas, was also engaged as a private enterprise in several other businesses, to increase its rates for natural gas, the Commission made the following holding:

That applicant was not entitled to charge as an operating expense the excess profits tax paid to the federal government, inasmuch as it was the purpose and intention of Congress to levy such tax so as to become a charge to be borne equally by all of the citizens of the United States falling within the same class, as a war measure, and the burden of such taxation should not in this case be shifted from the applicant to its consumers. — *In re Application of Hope Natural Gas Co.* (P. S. C., No. 663, Jan. 11, 1919).

Corporate Excess Taxes as Preferred Debts.—Where a corporation became insolvent and was put into the hands of a receiver, state corporate excess taxes assessed under the Tax Act of 1912, and which were due, were held debts of a public character and as such entitled to a preference. —*Winsor et al.* v. *Pilgrim Shoe Machinery Co.*, 105 Atl. 397.

Stock Dividend as Part of Principal. —Where the life tenant of the income of certain shares of stock died February 19, 1914, another succeeding as life tenant, and thereafter stock dividends were declared out of surplus earnings and profits accrued before the death, the stock dividends were held to belong to the principal of the trust and not to the life tenant under the Ohio rule which governed the case, since the life tenant should not have a portion of the trust property in existence at the time his interest begins. (Following *Wilberding* v. *Miller*, 90 Ohio State 208; 106 N. E. 655.) Held further that the life tenant could not claim such dividends upon the theory that they should have gone as income to the preceding life tenant, whose heir he was, and that it was equitable that he should receive the dividends in the character of an heir, since there was nothing to show that the former life tenant did not in fact receive all the earnings to which she was entitled as life tenant, and the

representatives of her estate had not been joined in the action.—*Farmers' Loan & Trust Co.* v. *Whiton et al.* (S. C., Spec. Term, Jan. 20, 1919).

Violation of Contract — Application of Tax Levy to Specific Purposes.—The holder of county warrants, issued for the construction of a court-house, brought an action against the county treasurer to compel him to apply funds in his hands towards the payment of such warrants instead of other purposes which had been authorized by the county authorities. The decision was that as the state court had held that action would not lie against the treasurer, the question was one of state procedure and was governed by state law, which left no federal question. The state court had held that the action should have been against the county officers, who might be held bound to carry out their contract (197 Ala. 384), but that the treasurer was not an appropriate party from whom to secure relief.—*Farson Son & Co.* v. *Bird, County Treasurer*, U. S. Sup. Ct., January 7, 1919.

Municipal Licenses — Contracts.—The validity of municipal ordinances imposing license taxes, when in conflict with a state law, was brought in question in a recent case. The ordinance in question imposed an annual license tax upon lighting corporations and a further tax upon electric railway companies, both impositions being stated to be levied as compensation for the use of the streets. These ordinances were claimed to be invalid as being prohibited by a constitutional provision and by the terms of the general tax law. The constitution provided for an annual state franchise tax upon the gross earnings of railway corporations which would be in lieu of all taxes and licenses whatsoever. This constitutional provision was repeated in the general tax law by a law providing for a state franchise tax law upon lighting companies which limited the amount to one-half of one per cent of the gross receipts. It was admitted that these provisions deprived the city of its right to levy the license tax in question, unless its right was preserved to it by contract which was claimed to be the case by reason of the terms of a previous ordinance granted to the company in question, under which the city reserved the right to levy a license tax. It was claimed that the ordinance in question was authorized by this reservation. The court points out that this provision in the ordinance could not be held to affect the taxing power of the municipality, which was wholly within the control of the Legislature, and could be changed at any time, and that contracts made by it with its citizens with respect to taxation were subject to nullification by the Legislature.—*City of Lynchburg v. Lynchburg Traction & Light Co.*, 97 S. E. 780.

Contracts of Tax Exemption.—In a recent case, construing the effect of certain credits allowed under the New York corporation net income tax law which is of only local interest, the court made some observations as to the distinction between contracts of exemption and the ordinary exercise of the taxing power, which may be of interest for reference. In the case in question, the corporations had been granted by the original law a credit for taxes assessed under previous laws and paid during the year the income for which was taken as the measure of the first tax under the new net income tax law. Thereafter, owing to an assumed inequality as between corporations located in different cities, having different fiscal years, a statute was passed reducing these credits by a proportion depending upon the beginning of the fiscal year of the city or town to which a tax had been paid under a prior law. The object was to equalize the relative taxes of separate corporations. This statute was made retroactive and for this reason it was claimed to create a violation of the contracts assumed to exist for the credit allowances under the original act, the corporation in question having paid the first tax computed under the new law.

The court, quoting from earlier cases, recognizes the possibility of a state contracting for an exemption with a particular taxpayer and that such contracts may become a binding obligation (*Gallatin Bank* v. *Commissioners*, 67 N Y. 516; *People* v. *Roper*, 35 N. Y. 629; *People* v. *Commissioners*, 47 N. Y. 501; *Christ Church* v. *Philadelphia County*, 24 How. 300). The following quotation from the opinion in *People ex rel. Cunningham* v. *Roper*, 35 N. Y. 629, at page 635, is quoted as "an

unusually clear and comprehensive statement of the law pertinent to this question":

"It is true that the state may, if it will, within the limits prescribed in its organic law, enter into private contracts with its citizens, by which the people and the government are forever bound; but we are never to construe a general statute as embracing such a purpose, when it is obvious that it was designed only as an expression of the legislative will for the time being, in a matter of mere municipal regulation. When this is the object of the law, those who act upon the faith of its provisions, do so with a reasonable assurance, indeed, that it will not be modified or repealed until such action shall be required, in the judgment of the Legislature, by the general interest of the community; but with notice that it is subject to revocation by the state, whenever the public exigencies may demand. Such a repeal involves no breach of obligation, in the sense of the federal Constitution; for the faith reposed is on the stability of a general law, and not on the efficacy of a legal contract."

The legislation was therefore held to contain no element of a contract but to be a mere exercise of the general taxing power, applicable to all corporations falling within its purview.—*People ex rel. Iroquois Door Co.* v. *Knapp*, 173 N. Y. Supp. 641.

Leasehold Interest — Charter Exemptions.—Certain railroads had, through their charters, been granted exemption from taxation except in a certain way and to a certain amount. Subsequently an attempt had been made to tax the lessee of such roads, upon the theory that, owing to subsequent state legislation, the estate of the lessee had become virtual ownership, and hence taxable to such lessee. This contention was rejected by the court upon the ground that the subsequent legislation "should not be construed as embracing an attempt to escape from a contract by a subtlety that almost defies ingenuity to understand" (*Wright* v. *Central of Georgia Ry.*, 236 U. S. 674). The state thereupon began the present action through an attempt to tax the lessee as the owner of the leasehold interest, arguing that if the leases produced a profit in excess of the rental, the excess value was required to be taxed by the state constitution.

It was held that the constitutional provision was subsequent to the charters that created the exemption and must yield, and that the exemptions created were protected. —*Central of Georgia Ry.* v. *Wright, Comptroller*, U. S. Sup. Ct., Feb. 3, 1919.

Banks.—A recent interesting decision by the United States supreme court involves the interpretation of the effect of the National Banking Act on the taxation of shares of banks. In the case in question a national bank owned shares in another national bank and also shares in a state bank. The California state board of equalization fixed the value of the assets of the bank in question, including in such value the value of the shares of the two banks which it owned, and assessed that value against the shareholders of the bank, pursuant to the state statute. In addition, the board assessed the bank as a stockholder in each of the two banks. The controversy resulted from the claimed illegality of these several assessments. The state court had upheld the assessments on the authority of *Bank of California* v. *Roberts*, 160 Pac. 255, which presented identical questions.

In dealing with the questions the supreme court announced the familiar doctrine, established by earlier decisions, that the object of the federal statute was to furnish a comprehensive and exclusive method whereby taxes should be levied upon these federal agencies (*People* v. *Weaver*, 100 U. S. 539; *Mercantile National Bank* v. *New York*, 131 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Covington* v. *First National Bank*, 198 U. S. 100). This was accomplished by removing the banks as such on their property from state taxation, except as to their real estate, which was specifically provided for. On the other hand, the preservation to the states of their taxing power and taxable resources was safeguarded by the provision that every resource possessed by the banks as national agencies, might in substance and effect remain liable to state taxation. This was accomplished by recognition of the fact that every available asset of the banks would be owned by their stockholders and would be reached by taxation of the stockholders as such, subject to the limitation against discriminatory taxation.

Coming to the case in question, it was held that the taxation of a national bank as a stockholder in another national bank was expressly sanctioned in *Bank of Redemption* v. *Boston*, 125 U. S. 60. But it was held that the principle upon which that case rested, led inevitably to the conclusion that such shares could not be again

used in valuing the assets of the owning bank for the taxation of *its* shareholders; that the federal statute in question must be deemed to contemplate the taxation of the ultimate beneficial interest and to do so through the one prescribed method which was the sole measure of state authority. Having reached this beneficial interest in the shares of the national bank owned, by taxation of the shareholder — the owning bank—it would overthrow the very ground upon which the taxation of stockholders must rest, to again tax this interest through a second tax on the shareholders of the owning bank augmented by the value of the shares owned.

As to the shares in the state bank, it was held that the state court erred in taxing the owning bank as a shareholder for these, as the ruling in the *Bank of Redemption* case applied only to stock ownership by one national bank in another national bank. This being so, the inclusion of the shares of the state bank in valuing the assets of the owning bank, was proper.

Mr. Justice Pitney, with whom Justices Brandeis and Clarke concurred, filed a vigorous and interesting dissenting opinion which may be read with profit, as it reviews the entire situation as to bank taxation, and discusses in an effective manner the distinction between a corporation and its shareholders in reference to taxation. He closes with the observation that "to allow a deduction from the taxable value of national bank shares because the bank happens to hold stock in another national bank is not only contrary to the clear intent of section 5219 but is inconsistent with all previous decisions of this court bearing upon the point, especially those that have denied a similar deduction because of tax-exempt securities held by the bank, or because of real estate taxed against it."—*Bank of California, National Association* v. *Richardson*, U. S. Sup. Ct., Jan. 27, 1919.

THE NATIONAL TAX ASSOCIATION

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TAX LEGISLATION—A RETROSPECT

There is much of interest for the members of our Association in a survey of the activities of the various state legislatures. The strain of increasing budgets coming, as it has, at a time when customary sources of revenue have reached the saturation point, and have in some cases been withdrawn from use, puts to the test the results of our past years of conference and study. One who compares the haphazard patchwork methods in vogue a dozen years ago, with the keen, intelligent, well-informed and yet practical processes of the present, must admit that our work has not been in vain. In state after state the success of the tax commissions, regular and special, in compelling recognition of the essential demands of sound taxation principles has been remarkable. The wide acceptance of the merits of such measures as the freeing of constitutions, the classification of property, the income tax, centralized control, limitation laws, dignifying the local assessor, budget laws, and many others which we have consistently urged, is evidence of the telling effect of the application of applied economics to the business of taxation. We do not recall an instance when, with fair opportunity, there has been failure to establish these points in committee or with the Executive. It is because of the impossibility to fairly present the arguments to an entire state or a legislature that they have been lost. All this goes to show the need of a wider and wider spread of our influence by an extension of our membership. The groups of individuals in each state who now are able to command attention because speaking with authority, are limited in their accomplishments by the vast multitudes of people who are uninformed and who cling to the past with a curious tenacity. But no one can view the deliberations of the recent legislatures without a distinct feeling that a lot has been accomplished. The requisites of fair and just taxation have been so thoroughly outlined and so universally accepted that whatever temporary setbacks may occur we are not likely to see any prolonged refusal to put these principles into practice.

Discouragement at the small result of intense and sustained effort is quite apt to be felt. When, however, one contemplates the entire field and notes the universality of progress—a little here, a little there—which characterizes the movement, he is made to feel a sense of satisfaction and encouragement.

NOTES AND NEWS ITEMS

State assessor Stetson of *Maine* writes that an income tax bill based on the Massachusetts form was introduced in the legislature and, after careful explanation by Professor Bullock and others, was promptly turned down by the committee, the opposition coming from every interest or industry affected; that a bill was then presented providing for a three-mill rate on intangibles, following the Minnesota law, which he predicts will meet a similar fate. Senator Pike, however, who introduced this measure, writes in a more encouraging vein and seems to be planning to push the bill energetically, following the authority of the constitutional amendment adopted in 1915.

It is somewhat difficult to reconcile the demand of the people of Maine for some sort of just and reasonable taxation of intangibles, with their refusal to enact the only practical measures which will produce the desired results.

As we remember it, the governor of *New Hampshire* suggested the trimming down of the tax commission to one member. Judge Fellows writes that "that cuts no ice" because anyway Mr. Brown will probably sit in the governor's chair in two years, that Mr. Amey is well satisfied with timber, and as for himself, his farm appeals to him. We can readily appreciate this last suggestion because, in view of recent events, apple orchards will appear likely to come into their own. Hard cider seems to be the only hope of the future.

Commissioner Plumley of *Vermont* has changed his official residence from Northfield to Montpelier, which leaves Maryland the only state as to which we have to remember that the office of the tax commission is not in the state capitol, it being in that state at Baltimore.

We take our hats off to Mayor Mahoney of Newport, *Rhode Island*. What a cinch! Mayor of the millionaires' retreat! It is up to the Judge to invite the Association to have its next conference under his auspices. This reminds us to observe that the system of taxation made famous by Judge Mahoney's appellation of it as a "discretionary system," is about to be tested in the Rhode Island courts at the suit of a taxpayer claiming that it is in derogation of legislative powers. The case arises with respect to the apportionment of the corporate excess tax of a foreign corporation.

No successor to Judge Mahoney for the tax commission has as yet been chosen.

In *New York* we have the usual spectacle. At least it looks that way from the newspaper accounts. The advent of prohibition hits New York a body blow and it would appear that at last some actual results would be reached and that at least a start would be made towards a rational system of taxation. Early in the summer the various groups of "patriots" began to devise plans for new taxes (on the "other fellow"). When the legislature assembled, it was soon seen that the problem required definite treatment. A joint committee was selected, headed by Senator Davenport, a member of this Association. This committee held hearings at which the aforesaid "patriots" appeared and presented their views, together with concrete suggestions for bills. After this the committee went into a series of executive sessions, and under the advice our members, Professors Bullock and Seligman and Messrs. Tanzer, Tobin and McClure, produced some bills which involve real taxation. It is surprising to observe the remarkable lack of enthusiasm for these bills displayed by the public at large, including the aforesaid "patriots." The propositions as indicated in the press, are for a personal income tax upon individuals, following the federal law, including non-residents as to salaries and wages and business transactions within the state (this for the Jerseyites); a uniform low rate tax on tangible property; an increase in the tax on mercantile and manufacturing corporations from 3 to 4½ per cent, and its extension to all business corporations, other than public utilities. There is little doubt of the sufficiency of the yield of these taxes to satisfy the

needs of the state and of the localities, as a division of the yield of the income tax is planned, but for the sake of certainty, there is talk of an optional business income tax to be applied locally at the option of any taxing district.

These measures are just about to be presented to the legislature, and by the time this reaches our readers there will have been plenty of discussion in Albany.

The abomination of politics enters into the situation and is one of the discouragements, the prevalent irritation over the federal income tax being used to defeat any further extension of that sort of a tax.

The advent of a democratic governor has brought a democratic member to the tax commission in place of Commissioner Thomas, whose term expired. The vacancy was filled by the appointment of Michael J. Walsh, postmaster of Yonkers.

Commissioner Maxwell of *North Carolina*, whose article on the state tax situation appeared in the March issue, seems prepared to conduct an industrious campaign for taxation reformation. The first step has been accomplished through the adoption for submission to the people, of a constitutional amendment to provide for an income tax to take the place of a property tax on intangible property. After this question is determined, it will be possible for progress to be made, and the special tax commission will doubtless feel it necessary to await the fate of the amendment. Mr. Brown, a member of that commission, has recently published some notes submitted by him to the commission along the lines of the paper which he read before this Association in 1916, indicating that his position taken at that time remains unchanged.

That the passing of the *Florida* tax commission has not meant the complete abandonment of plans for improvement in taxation in that state, is indicated by the report of the special taxation committee which has just been formulated, though not made public. It will be held for submission to the legislature which meets in June, but unofficial advices indicate that the recommendations are in line with modern thought on the subject. They will propose a constitutional amendment for the classification of property, a low rate tax on intangibles, the creation of a state supervisor of taxation to act with the county officials in equalizing assessments. They will also recommend the triennial assessment of property.

A state taxpayers' league is being organized under the leadership of Mr. J. E. Downey, formerly clerk of the state tax commission. It is the intention of this league to conduct a campaign for the dissemination of information on the matters to be considered by the special tax commission.

In *Georgia* the Special Legislative Commission has completed its outline of suggested changes and is just about to begin a tour of the state to hold public sessions in order to permit, as Senator De Jarnette expresses it, "any citizen in his own behalf or for any organization of which he may be a member to confer with us and freely express his views." The committee hopes thus to create a widespread interest in the matter and secure helpful suggestions for their final report which is to be submitted to the legislature when it meets the last of June. It would appear that one of the ends sought is to secure definite constitutional authority for classification of property with perhaps the imposition of a special rate on intangibles.

In *Ohio* the loss of revenue from the prohibition amendment has raised very serious questions, which are now being discussed by the General Assembly. The unfortunate fate of the constitutional amendment for classification has prevented relief in that direction, so that the revenue must be raised in some other way. A special non-partisan joint committee has the matter under consideration and commissioner Peckinpaugh writes that the proposition most favored at present is to allow the rates of the tax limitation law to be exceeded by a specified amount for a limited number of years and to provide for the resubmission of the classification amendment at an early date. The committee will doubtless recommend the passage of a direct inheritance tax law, and it also has under consideration the strengthening of the present assessment laws by giving authority to the tax commission to order a reassessment and also to give it more direct control over the taxation of personal property.

In *Indiana* a very strenuous struggle

took place at the recent session of the legislature, aroused by the somewhat comprehensive bill prepared by a group of citizens, including the members of the state tax commission. The chief attack upon the bill at the start was on the provision to tax intangibles at 25 per cent. This raised a storm of protest on the part of the farmers and was finally abandoned, whereupon, after much discussion, the act was amended and, as finally passed, requires all property to be assessed at its true cash value with a limitation on the amount of tax that any unit may raise, the limit being the amount raised in the previous year with a provision for an appeal to the state tax commission.

The pay of township assessors is raised from $2.50 to $4.00 per day, and some increase has been made in the salary of county assessors. The tax commission has been made a separate board of three members to be appointed by the governor, and has been given considerable increased power over local assessors, including the power of removal of an assessor.

All this seems a small accomplishment, but it should be remembered that things that are easily admitted as matters of course in the newer states seem to have the most severe opposition in the older states where ruts have been cut from which it is difficult to arise.

Another state where conditions have always been unsatisfactory is *Tennessee*, and we are pleased to note that under the direct personal inspiration of our member, Governor Roberts, considerable was accomplished in that state at the recent session of the legislature. The railroad commission has been given very broad powers over the matter of equalization of local assessments, it having been charged with all the duties of the former state board of equalization except the power to review assessments of utilities which are made by it. These assessments will be subject to revision by an ex-officio board of equalization consisting of state officers with the governor as chairman.

Professor Stockton writes that, contrary to his forecast in the October, 1918, BULLETIN, the electors of *South Dakota* cast a general "yes" vote at the November election and ratified about a dozen amendments to the state constitution. One of these amendments gave the legislature authority to classify property for purposes of taxation. The 1919 legislature immediately took advantage of its new powers and passed several laws giving considerable relief from the general property tax. One measure provided that money and credits, except domestic mortgages, should be taxed annually at three mills on the dollar. A second law imposed a registry tax on mortgages secured by South Dakota realty. The rate of the registry tax was fixed at ten cents on each $100, or major fraction thereof, for mortgages running one year or less, plus an additional ten cents on each $100, or major fraction thereof, for each year or fraction of a year that mortgages may run in excess of one year. A maximum limit of fifty cents per $100 was fixed upon this accumulation. Property paying the three-mill tax or the registry tax was declared exempt from all other taxation and the proceeds of both taxes was ordered to be divided between the state, the counties, and the school districts.

What look like mild approaches to single-taxdom were two laws which granted a $500 exemption on each of the following classes of property: dwelling houses occupied by their owners as homes, household furniture and provisions, farm tools and machinery, and mechanics' tools. An unsuccessful attempt was made to obtain a similar exemption for business structures in cities and towns.

The salaries of the tax commission were increased. The "commissioner," or chairman, was granted $3,250 per year and the other two members were given $3,000. The pay of county and township assessors was raised to a possible maximum of $5 per day. The state budget board was retained and its membership was increased from five to seven. Much satisfaction was expressed over the work of the outgoing board, which was the first ever to make a report to the legislature. Increases were made in the state inheritance tax and in the auto license fees.

Secretary Fletcher of the *Nevada* commission writes that the legislature of 1919 enacted few laws of importance in matters of taxation or of interest to tax students. An executive budget law, copied almost verbatim from the Maryland law, was

passed unanimously by both houses, the choice and introduction of this particular bill being suggested by the tax commission. A serious attempt was made during the session to abolish the office of county assessor and to place the entire control of assessments for taxation in the hands of the tax commission, but the bill failed to pass. The proponents of the measure propose to take the matter to the people by means of the initiative law. An attempt was made to repeal the present tax commission law under which the five leading industries of the state have each a representative on the commission, and pass a law providing for a purely ex-officio tax commission consisting of the governor and two members of the public service commission. This bill also failed of sufficient support. Following the recommendations of the tax commission in its biennial report and of Governor Boyle in his message to the legislature, a joint resolution was introduced providing for an amendment repealing the present hard-and-fast general property tax clause of the constitution and putting in its place the provision for a classified property tax recommended by this Association, but it met with defeat.

The most important news from *Kansas* is that our ex-president Howe was reappointed by Governor Allen. This was, of course, to be expected, but is nevertheless a matter for keen satisfaction to tax students. The newspapers give him a splendid and well-deserved "send-off." The vacancy in the commission was filled by the appointment of Col. William McDowe Rowan of Garden City, now with the thirty-fifth division in France. He takes office June 30. Judge Howe writes that a new law for the taxation of banks and loan and trust companies (act approved March 6, 1919) was passed under which it will be possible to establish a uniformity in the treatment of these institutions. The law removes a discrimination heretofore existing as to state banks and provides a uniform rule for the assessment of the shares.

The attempt to restore the direct inheritance tax was only partially successful, as the exemptions to the widow ($75,000) and to other direct heirs ($15,000) are so high as to be entirely out of line with such exemptions in other states, being with the majority of states below $10,000.

At last the adoption of a classification amendment was obtained which will be submitted at the 1920 election. It reads as follows:

"The legislature shall have power to establish and maintain a just and equitable system for raising state and local revenue, and may classify the subjects of taxation in order to secure a just return therefrom, and may exempt property when public welfare will be benefited thereby. . . ." (Then follow the exemptions.)

Commissioner Zander of *Arizona* writes that the recent legislature passed a bill providing that automobile owners must produce a certificate of payment of personal property taxes as a prerequisite to obtaining a state license.

The salaries of state officials were raised 30 per cent and the tax commission was given explicit authority to employ an attorney, which the commissioner says it "will certainly use." He adds with evident pleasure that "for the first time in the history of the tax commission there was no effort made in this session of the legislature to curtail its powers, to limit its functions or to question its unlimited appropriation. The League of Nations is no dream."

A newspaper headline runs as follows, "Happy *Wyoming* has no problems." The article contains an interview with our member, Governor Carey, which bears out the above. In his speech of acceptance, the governor recommended an executive budget system and an equalization bill to put land values on the same basis all over the state, both of which were enacted into law, and he says that the new state board of equalization, to be appointed by him, "will have power to go into every county in the state and order the commissioners to raise or lower land values according to the policy of the rest of the state; that the state expects thus to get the taxation problem on a business basis."

The legislative session in *Missouri* has been interrupted by political issues raised by the war and the pending problems of peace, so that little constructive legislation appears to have been enacted. As to taxation, the issue of unconditional surrender to the "full value" basis, raised by the tax commission in its first year in office, as fully

discussed, together with many other interesting problems, in its first report, heretofore noticed in the BULLETIN (see vol. IV, 111), has apparently resulted in a "situation." The state board of equalization last year made a wholesale "equalization" of the local assessments, leaving them considerably lower than as made by the local assessors and by the tax commission, though somewhat above those of the previous year. This year the tax commission again took up the cudgels and has just submitted its report, with a sort of a challenge to the board of equalization to either show the work incorrect or let it stand. Our information, obtained from the newspapers, is that another "equalization" will be made.

The governor, who is a member of the board of equalization, with one other member voted last year to sustain the commission, and will, it is said, do so again. The majority, however, are against the "full value" plan all at once, claiming that as certain of the rates are fixed by law, some districts will be compelled to raise altogether too much in taxes, and that in any event a general increase suddenly made, will increase rather than diminish inequalities.

The controversy has evidently been distasteful to the governor, who seemed at one time inclined to give up the contest, forsake the tax commission, adopt the "separation" remedy, raise the state taxes by income, excise and inheritance taxes, and let the counties go on as they please.

This plan the tax commission vigorously opposed, using with telling force the arguments with which we are all familiar and quoting extensively from the published addresses of some of our members. This plan seems now to be abandoned, but it is said that the governor has lost interest in the issue. Meanwhile bills have been introduced to abolish the commission, and in bills amending the income and corporation excise tax laws the administration appears to be given to the board of equalization.

For lack of definite information, we give the above gathered from the newspapers as an illustration of the perils of tax reform.

The *Louisiana* board of state affairs, under the energetic leadership of Chairman Thomas, has been persistently and insistently pursuing the course originally set, and with marked success. The result may be attributed in part to the plan but more doubtless to the energy of the board. It will be recalled that when the "full value" plan was started and the board created, constitutional amendments and statutes were adopted designed to prevent criticism and invite public support. The state rate was largely reduced; the new valuations were made to apply only to the state tax levies, the localities being, as we understand it, left free to adopt fractional values. Local levy limits were, however, reduced and every inducement given to secure better local assessment work. The board has kept up a continuous pressure, using its powers to inspire the local officials to follow its example. The members of the board have made extensive tours of the state, making addresses and distributing them widely. All this is again illustrative of the kind of work which it is essential to do in connection with the upbuilding of the fiscal system in a state where there has been no centralization and where the local assessor has had to perform his tasks without the encouragement and support which come from some co-ordinating body designed to emphasize the essentially state-wide bearing of the work of local assessors and its definite and distinct importance to the general welfare of the state.

The Louisiana state board of affairs seems to be accomplishing much for the cause of tax reform.

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Sworn and subscribed before me this 8th day of April, 1919. CHAS. E. LONG, [SEAL] Notary Public.

(My commission expires Jan. 21, 1923.)

CONSTITUTIONAL ASPECTS OF THE CHILD LABOR PROFITS TAX

ALEXANDER M. HAMBURG
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1. *Introduction*

Last June, the Supreme Court of the United States declared unconstitutional the so-called Child Labor Law which prohibited the transmission in interstate commerce of the products of child labor.[1] In the recently adopted revenue act an excise tax equivalent to 10 per cent of the net profits received from the sale of products of establishments employing child labor is imposed. The latter measure is evidently intended to accomplish the same object which the former was unable to reach. It having been conclusively decided that Congress was without authority to regulate child labor by virtue of its power over interstate commerce, may it, by indirection, control child labor through an exertion of the federal tax power? In both cases the end sought is identical; the means used are different. It is the purpose of this article to inquire whether this new legislation is open to constitutional objection.

2. *The Tax as an Excise*

In terms the applicable provision of the Revenue Act imposes an excise tax. There are but two limitations upon the power of the federal government to levy excise taxes: they must be for a public purpose; and they are required to be uniform.[2] It is well settled that "uniformity" refers purely to a geographical uniformity, and is synonymous with the expression "to operate generally throughout the United States."[3] Subject to the above limitations, the power to levy excise taxes reaches every subject and may be exercised at discretion. The tax in question presents no serious difficulties when regarded purely as an excise tax.

3. *As an Income Tax*

Viewed as a form of income tax, i. e., a direct tax upon the net profits arising out of income derived from the results of business, the legislation is to be tested by two independent provisions of the Constitution. In so far as the Sixteenth Amendment is concerned, it was recently decided in *Brushaber* v. *Union Pacific Railroad*[4] that the purpose of this amendment is to relieve income taxes from the requirement of apportionment by consideration of the source from which the taxed income may be derived. Under this interpretation, discussion whether a direct tax on the income is identical with a direct tax on the source itself, is foreclosed.

The question whether the Fifth Amendment constitutes an implied limitation upon the federal taxing power is not to be easily disposed of. The guarantee of due process of law found in this amendment binds the federal government in substantially the same manner that the corresponding provision of the Fourteenth Amendment binds the states. In a previous article published in this BULLETIN[5] the proposition whether the due process clause *should* limit the federal taxing power was considered. The view of the Supreme Court, expressed in the *Brushaber* case, allows no basis for reliance on the due process clause.

> "Such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."

It may be contended that a tax of 10 per cent upon net profits, in addition to other taxes, is virtually prohibitive and manifestly discriminatory. Even if this be conceded, the due process clause affords no

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[1] *Hammer* v. *Dagenhart*, 247 U. S. 251 (39 St. L. 675, ch. 432).

[2] *Patton* v. *Brady*, 184 U. S. 608; *Nicol* v. *Ames*, 173 U. S. 509.

[3] *Knowlton* v. *Moore*, 178 U. S. 41.

[4] 240 U. S. 1; see also *Stanton* v. *Baltic Mining Co.*, *ibid.*, p. 103.

[5] See the writer's article on *Limitation upon the Federal Taxing Power*, BULLETIN, November, 1917, p. 35.

basis for relief. The essential question is as to the existence of power to affect the particular subject matter; the result of the exercise of power admitted to exist, is beyond judicial cognizance. An analogous instance indicative of the attitude of the Supreme Court is found in the *Trading Stamp Cases*[6] decided in 1916. These cases involved the validity of state laws taxing the use of stamps and coupons, and it was contended therein that the license taxes imposed were exorbitant and of a prohibitory character; that the excessive taxes prohibited the pursuit of lawful dealings in "harmless" commodities. But the court held that the statutes under review did not violate the due process clause of the Fourteenth Amendment, and that the business schemes used were not protected from regulation or suppression.

4. *Encroachment on State Authority*

The Supreme Court, in its decision holding the child labor law invalid, did not regard the exclusion of the products of child labor from the channels of interstate commerce as a violation of the due process clause. The fundamental objection was declared to be its encroachment upon the reserved powers of the state; that it "exerts a power as to a purely local matter to which the federal authority does not extend." It should be noted that in the dissenting opinion filed by Mr. Justice Holmes, and concurred in by three other Justices, reliance was placed mainly upon cases relating to tax laws. The *Oleomargarin Tax Case*,[7] the *State Bank Note Tax Case*,[8] and the *Corporation Tax Case*[9] were cited to show that it was well established that "the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state." These cases take on additional significance in the light of the legislation now under consideration. They may be cited as authority for excluding any inquiry into the purpose, effect or reasonableness of the tax. Under the doctrine of these cases, the court will not look beyond the ostensible purpose of the measure; nor will it scrutinize the motives of Congress. The propriety of the exercise of a power admitted to exist is a matter of legislative, not judicial, concern. Therefore, if the court is to follow consistently its prior rulings, it will regard the statute solely as a revenue measure and ignore its other aspects. In the *Harrison Drug Act Case*[10] it was said:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating these ends as to be reached only through a revenue measure, was right."

Granting that the regulation of the conditions of child labor is a matter exclusively within the control of the several states, is the federal government estopped from levying a tax such as now imposed? That this question is settled is beyond dispute.

In *Knowlton* v. *Moore*[11] it was contended that since the power to regulate the devolution of property on the occasion of death was lodged solely in the several states, therefore Congress was without authority to levy legacy and inheritance taxes. Replying to this contention, the Supreme Court said:

> "In legal effect, then, the proposition upon which the argument rests is that whenever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several states on the other, the exercise of such rights can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the state to tax objects which are confessedly within the reach of their taxing power, and also excludes the national government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the state cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? . . . Under our constitutional system both the national and state governments, moving in their respective orbits, have a common authority to tax many diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other. . . ."

5. *As an Extension of Federal Power*

A plausible conception of the tax under consideration is as a license tax imposed as

[6] *Rast* v. *Van Deman*, 240 U. S. 342; *Tanner* v. *Little*, *ibid.*, p. 369; *State* v. *Pitney*, *ibid.*, p. 387.

[7] *McCray* v. *U. S.*, 195 U. S. 27.

[8] *Veazie Bank* v. *Fenno*, 8 Wall. 533.

[9] *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

[10] *U. S.* v. *Jin Fuey Moy*, 241 U. S. 394.

[11] *Knowlton* v. *Moore*, *supra*, at p. 59. See also *License Tax Cases*, 5 Wall. 462, 471.

a condition of the right to engage in interstate business. It is within the authority of the federal government and not the states to make conditions of this character.[12] But the tax is not confined solely to those engaged in interstate business; it is coextensive with the evil aimed at, and includes the intrastate business as well. The *Child Labor Case* held that the facilities of interstate commerce could not be denied to employers of child labor. Will the court, by some process of refined logic, justify a greater control exercised by means of the taxing power?

There are many cases to support the proposition that Congress may, in the exercise of its delegated power, adopt means having the character of police regulations.[13] In the taxes levied on cotton futures contracts,[14] on the manufacture of phosphorus matches,[15] and the federal taxes above mentioned, Congress has exercised the taxing power to regulate and suppress practices which it conceived to be inimical to the public welfare. It is not to be denied that if the tax upon the profits of child labor is upheld it will mark an extension of the federal police power beyond anything heretofore attempted. Confronted with this measure, involving vital elements affecting the public welfare, it is highly questionable whether a decision by the Supreme Court will be based on some legalistic formula. If viewed purely as a tax law, there is apparently no serious constitutional objection It is to be hoped, however, that the court will uphold the tax by adopting a liberal attitude in harmony with its best traditions.[16]

[12] *Robbins* v. *Taxing District*, 120 U. S. 489; *Flint* v. *Stone Tracy Co.* (*supra*).

[13] *Camminetti* v. *U. S.*, 242 U. S. 470; *In re Kollock*, 165 U. S. 526.

[14] 39 Stat. 476.

[15] 37 Stat. L. 81.

[16] See *The Child Labor Law Case*, by T. M. Gordon, *Harvard Law Review*, XXXII, 45, November, 1918.

SIDELIGHTS ON THE MODEL TAX SYSTEM COMMITTEE REPORT

From address by Charles J. Bullock

[At the recent New York State Tax Conference, held in Albany, Professor Bullock gave some interesting sidelights on the principles underlying the report of the model tax system committee. With the thought that his remarks may be found to be of general value in connection with the consideration of the report, we produce extracts from them, as well as a synopsis of his answers to questions which followed his address.—EDITOR.]

Such were the principal recommendations of our committee, and when we came to put them all together, it occurred to us that, after all, we were recommending nothing new. We recalled that certain foreign countries had systems of direct taxation that were much like that which we were about to recommend to the American states. We recalled that personal income taxes, direct taxes objectively levied upon real estate, and direct taxes levied upon business incomes where made, were well established and had been long in operation in the taxation systems of France and of many, if not most, of the German states. We also were impressed with the fact that such a diversified system of taxation would bring about a much fairer distribution of the taxation burden than any single tax levied on property or income or business alone could possibly bring about, and would offer many administrative advantages. Let me enumerate two or three of them.

In the assessment of any tax, whether it be levied on real estate or on all property or on income, there is bound to be a certain amount of inequality. There will be some avoidance or evasion, and even without any intention of the taxpayers to avoid assessment, the utmost care and intelligence will make it impossible to bring it about that no inequality anywhere arises from the operation of the tax law. Substantial equality is all that you can expect. Now, if you levy just one tax, whether on property or on income, and pile onto that tax all the burden of supporting all your governments, central and local, it is obvious that every bit of inequality that arises

in the practical operation of the tax will be intensified with every fractional increase in the rate of taxation imposed on taxable property or income. All the unequal pressure, or hardship, caused by the tax is put on certain fellows who cannot evade it, and every increase in the rate intensifies the hardship and the inequality. Now, under the diversified system your inequalities will not all come in the same place. It may happen once in a while that the fellow who suffers under the property tax will suffer equally under the income tax, so that he will get no relief under the diversified system; but by the law of probability, it is more likely to come about that the fellow who gets a little the worst of the practical operation of the income tax will not be the man to suffer in the practical operation of the property tax; so that there will be a certain compensating effect. The inequalities will not all fall on the same fellow, and you will get a much more just distribution of the burden.

It is also a fact that such a diversified system brings it about that incomes derived from property will pay a heavier rate of taxation than incomes not derived from property, which most people would consider just and expedient. Your income tax can be levied at the same rate on all classes of income without attempt to differentiate; and then your property tax, falling on all tangible property, will automatically bring it about that the sources from which property incomes are derived will contribute more to the support of government than personal sources such as wages and salaries, which will be reached under the income tax.

In conclusion, our committee in its report emphasizes the great importance of a proper administration of tax laws. No system of taxation, if enacted into law and left to carry itself into effect, will go very far toward the desired result of giving the state a good revenue system. In this country in times past we have not gone so far as that. We have not enacted taxation laws and then left them to administer themselves, without any administrative machinery; but we have done something which in certain places and at certain times has had very much the same result. We have left our property tax laws to be administered by local boards of assessors who have been underpaid, who have usually had to obtain their positions by becoming candidates for elective office, and who therefore have exercised an authority that has rested upon the suffrages of the taxpayers whom they are to assess. We have left them without skilled advice or supervision or assistance from any central tax authority, and have then blamed them when they did not do their work well.

Now, under such conditions of complete decentralization of assessment, with the cutting up of the state into very small assessment districts—too small to be able to employ men on full time and who are paid adequate salaries to warrant them in making their work of assessment a life profession for which they fit themselves by study and training—by doing that, we have made the administration of our tax laws in some cases farcical, in all cases unsatisfactory. What we need is, first, the improvement of the conditions under which the local assessor does his work. We need larger assessment districts; we need higher salaries; we need better conditions of tenure. Then in addition to that we need the development of state commissions that shall put at the disposal of every assessor the knowledge of an expert state board which can advise him with regard to any difficult problem of taxation. By the improvement of local assessment work and the extension of state advice, supervision, and, where necessary, control, we may hope in the course of time greatly to improve the administration of our tax laws. It is not the opinion of the committee that our proposed model system will administer itself; nor will any other system of taxation.

Gentlemen, with that explanation of the report, I will close my remarks for the evening. If there are any points that I have not clearly explained, or if there are any questions that occur to any of you, I shall be glad to have you bring them to my attention.

Question: Upon what principle was the distribution of the yield determined?

Answer: A business income tax, if levied in addition to the personal income tax, might very well be distributed by a different method; but any state that levies a personal income tax faces a somewhat difficult, though by no means insoluble, problem of distribution. It seemed to our committee that inasmuch as this tax was intended to

bring it about that every citizen contributes something to the support of the government under which he lives, every government — township, county, and state — ought to have a share of it. It seemed to us that the fairest method of dividing it would be to give each of them a proportion corresponding to the proportion which state expenditures or county expenditures or township expenditures bear to the total expenditures of the commonwealth. If state expenditures are one-fifth of the total, county expenditures one-fifth, and town expenditures absorb the remaining three-fifths, the revenue should be divided twenty, twenty, and sixty per cent, respectively. Obviously the state, once every five or ten years, by following the statistics of expenditures, can readily make such an apportionment equitably. In the average state the revenue should go back to the district where the taxpayers are domiciled. In Massachusetts we have not been able to do that because there had come to be a great deal of colonization, by which some towns had a tax rate of only three dollars a thousand, whereas other towns had tax rates of thirty dollars per thousand. Those conditions were brought about by colonization of taxpayers in wealthy country towns where the scenery was attractive and the assessors were good fellows. We couldn't perpetuate that condition, and we provided a temporary method of distribution by which in the first year of the income tax law's operation each city and town received an amount which compensated it for the revenue lost by the exemption of intangible property from local taxation; and then the balance of revenue was divided among the towns and cities in the same proportions as the direct state tax. I believe that not many states face such a degree of colonization as Massachusetts does. In the other states it is a simple matter to have the revenue go back to the county and municipality where the taxpayer is domiciled and to divide between municipality, county and state in the manner indicated.

Question: Was the inclusion of a business income tax one of necessity, or part of your whole plan? First, a personal income tax, to be followed if further revenue was needed by a business income tax. Is that the order that the committee felt should be adopted?

Answer: I think this would be the feeling of the members of the committee, where it is the revenue consideration that controls. Tax personal incomes, then levy your tax on tangible property. No state can dispense with either of those two taxes in these days. Then, if you need more revenue, levy the business income tax. You could even make that an optional local tax, that is if any particular municipality needed more revenue than others and wanted to levy a tax of one per cent, we will say, on all income earned from business carried on within the municipality, that would not concern any other municipality in the state. It would not attract business away from any other municipality. It would not be like establishing an exemption. Any one municipality could do that if it needed the revenue without injuriously affecting any other municipality. So the business income tax could not only be used as a supplemental state-wide tax, but, if not so wanted, could be used as a supplemental local tax; but it would have to be levied very strictly in that manner as a local tax. That may interest you on account of the proposals made at various times to tax Jersey commuters. You haven't any business to tax them under the personal income tax. They belong to Jersey to tax in that way. But, after you have levied a business income tax on the residents of New York, it is all right to impose the business tax on them. If a New Yorker does business in Jersey, Jersey will get him with a business tax, if she levies one. The arrangement is a fair one, capable of universal application, without injustice or confusion anywhere.

Question: Suppose you tax a Jerseyite by a business tax in New York, and New Jersey had an income tax. He would pay a double tax, wouldn't he?

Answer: But the New Yorker would also be paying two taxes. The personal tax would be levied in the state of domicile; the business tax in the place where business was carried on. The state that levied the business tax in addition to the personal tax would be levying two taxes on all persons domiciled in it. The New Yorker would pay a personal tax and a business tax, and the Jerseyite would pay the same. It would be a double system of income taxation. Double taxation is ob-

jectionable when some things get taxed twice, while other things are taxed only once; but if everything is taxed twice there is no inequality.

Question: To whom is the income reported? The regular assessor?

Answer: We believe that an income tax, to work well, must, generally speaking, be administered by the state. No doubt a large city like New York, with a large office, well equipped, and manned by men who are paid good salaries, could, in cooperation with a state tax commission and with the assistance derived from the federal authorities, administer a business income tax pretty well; but it is the opinion of our committee that the administration of income taxes, especially the personal income tax, ought to be left in the hands of the state, and that is what Wisconsin and Massachusetts have done with their state income taxes. Both are administered by the state, strictly and justly.

Question: I would like to hear your answer to the objection that an income tax as a tax on wages, discourages personal effort.

Answer: In the long run, how much revenue can you get from non-productive property? In the long run, there is not anything else to levy taxes on, is there? I do not see any way to avoid that under any system of taxation. It is true that a property tax gets at things like statuary, paintings and automobiles, objects of luxurious concern, which an income tax does not get at; but we have other ways of getting at automobiles, and paintings and statuary are not a serious subject; and even if an income tax lets articles of luxury escape, to remedy the situation is easy. There are luxury taxes in other countries.

Question: You think the large incomes are the result of personal effort, or largely derived from property?

Answer: They probably come from both, but under a progressive income tax you can levy a higher rate upon the larger income, and it was supposed by our committee that that would be done.

Question: Would you resort to the income tax for deficiencies in the revenue?

Answer: I believe that under present conditions, American states in levying taxes upon things like inheritances and incomes need to levy taxes at rates that may be known and depended upon. I do not believe that, without loss to itself, any state can use an income tax as an elastic source of revenue. We faced just that problem in Massachusetts and faced it very acutely. We levied a six per cent tax upon income from intangible property, and enforced it. A man cannot live in Massachusetts without coming across. None of our neighboring states enforce their taxes on intangible property with such strictness, and there is a very nice balance in the minds of the taxpayers between the attractions that Massachusetts offers with the certainty of a six per cent income tax, and the advantages that neighboring states offer with the certainty of not paying the tax on the full amount of intangible property. Then, too, there is the balance of interest in the taxpayer's mind when he compares a taxed investment with an untaxed investment. He is all the while having the untaxed investments offered to him. Now, I am perfectly clear in my mind that if the legislature takes our six per cent tax on intangible property, which is a great surcess, and raises that rate whenever it gets hard up, we shall get less revenue from it in the long run. The only thing we can do, as long as conditions in adjoining states remain as they are, is to let that six per cent rate remain there, and let investors know what to expect if they come to Massachusetts. I do not believe American states can now make their personal income tax elastic. You have got to find elasticity somewhere else.

Question: In the beginning of the establishment of such a form of taxation in a state like New York, with incomes so very great, wouldn't it be advisable to start with a smaller tax, which might later have to be increased?

Answer: I think very likely that may be so. I referred to our rate just to give definiteness to my answer. Anything that you do will be fine for us—that is, if you enforce a tax of two per cent here, that will give people less inducement now to leave Massachusetts and come to New York. People will pay us six per cent. Some who left formerly will come back. You will have no trouble with two per cent.

Question: As to the New York situation?

Answer: I may not fully understand your situation. Anything that I say now

would be subject to possible correction if I were to sit down here for a week and really study your situation; but from what I know of it, I am inclined to think that you may need to go back to the imposition of some kind of a tax on tangible personal property, without offset for debts. As I said, I do not think you had better go back to the attempt to levy the same rate upon it that you do upon real estate, because I am satisfied that administrative officials in any state would find their hands tied by their own disinclination to do perfectly fool things in the way of driving business out of the state. It was the opinion of our committee that tangible personal property ought not to be exempted, and ought to be taxed without offset for debts, at a rate that does not exceed what you can strictly enforce. That would imply, of course, returns of the property, and it would imply not taxing the man on a given day, but taxing the average amount for the year, though not necessarily an average determined by taking twelve inventories. That is unnecessary. The average amount should be determined by conference between the official and the taxpayer on the basis of sworn returns. That can be done, and unless your situation differs from that of every other state that I know anything about, that is the line I should recommend. I mean a tax on tangible personal property, without offset for debts, because it is getting the protection of the law, and it should make no difference who is the owner. You cannot tax it at twenty dollars. If I were advising this state, I would not recommend anything over five. Collect by sworn returns, with the tax commission given full authority to go and get it if the local assessors do not—but get it. I don't think you would drive business out of the state.

Question: In order that the real property tax may conform to the foundation principle of all taxation, viz., "ability to pay," is it not necessary that it should bear some proportion to the revenue derived from the property, including in such revenue any advance in capital value as and when received? And if so, should not any model system of taxation include some provision in that direction? And should it not call for some reform in the real property tax?

Answer: In every system of taxation there has to be some shock-absorber. Now, sometimes the shock-absorber is a bond issue. That is often a very bad kind of a shock-absorber, because it does not really absorb the shock. It just passes it along to a future year, and successive accumulations of shocks pass along to subsequent years, and finally bring a big shock that is worse than any one of the shocks that has passed along. Another shock-absorber that has been tried in the United States is the general property tax. During the Civil War we had something like the situation which Canada and some parts of the United States had during the present war. We just raised our general property tax on real and personal property. That is the way we absorbed that shock. We did not do real estate any good, because personal property simply went into cover or emigrated, and after 1870 real estate, instead of bearing 50 per cent of the taxes, had to bear 70 to 80 per cent of all the taxes permanently.

Now the income tax which is going into effect in various states and which is being used by the federal government, has been used by the federal government as one of the shock-absorbers in the present war. The federal government has levied the income tax at rates which make it almost impossible to do business in a normal way —rates that make waste a virtue and make enterprise hazardous and almost foolish; rates which cannot possibly continue if business is to go on. A patriotic people has done the best it could with them in time of war, and the government has not enforced the law any too strictly where it would bankrupt taxpayers. If the states tried to use the income taxes as shock-absorbers, they would spoil their income tax without absorbing many shocks. The income tax is not adapted to taking up big shocks. So far as I can see, the interests of the real estate owner are best subserved by a system that makes real estate a shock-absorber. In Cambridge our assessments are true value. This system was got up just before the war, and we got every dollar that could be got into the assessment-roll. Values have since dropped and there is very little property in Cambridge that can be sold for what it is assessed for. Our tax rate is $25 a thousand. In Cambridge we are digging down and trying to get through, in the faith that conditions are

going to improve presently. They must, and will improve. But we should not help Cambridge real estate by levying taxes either on income or on personal property or business that would drive personal property and business out of Cambridge, to stay there during the next generation. Our real estate would not be worth owning under those conditions. We face, at the present time, both here and in Canada, utterly abnormal conditions, but it is my belief, as an owner of real estate, that the best thing is to dig down and see the thing through and wait for conditions to improve. I am opposing in my own state an increase in the state income tax, which is advocated as a means of relieving real estate, because I think it will hurt it.

The gentleman's question referred to the "ability" theory of taxation. The "ability" theory of taxation, whatever its merit, does not cover the whole ground. It is, in my opinion, an inadequate theory of taxation, and so far as the local taxation of real estate is concerned, I believe we get along better by proceeding on the benefit theory, and looking upon the taxes our real estate pays as paid for the services that the government provides for real estate. I would rather have the service provided and have the extra cost, above what we can get from taxes that will not drive away income and property put upon real estate, than not to have the services provided or have the taxes put upon property that could and would leave Cambridge and Massachusetts. I do not intend to give any one the impression that I think it a good idea to over-value real estate. When we valued real estate in Cambridge we sought to arrive at the true value, but the war came on and values have slumped. When that happens it is not possible to put assessments down immediately. Five years is a very short period in which to write assessments down. Property is mortgaged, and it cannot be done quickly. Most of the taxpayers do not want it done. They hope bad conditions are temporary. Of course it is best to value property at its true value and not at a fictitious value, and let the tax rate be what it will, because that will bring home the true cost of government and will make the people interested.

Question: In the adoption of the income tax as part of the model tax system, has the committee considered at all the listing system, so called?

Answer: The Association has not yet adopted the report. The report simply represents the opinion of the committee to date. The committee considered in their report the general property tax. It considered particularly the plan of a tax on net assets as a personal tax, rather than an income tax. But we found that such a tax on net fortunes, if levied as a personal tax, would encounter constitutional difficulties in the case of foreign real estate outside the state where the taxpayer lived, and so for that reason we rejected it. As between the listing system—the attempt to list all property for taxation under a property tax—and the income tax, the deliberations of our committee can perhaps be left out of account. I will express my own opinion. I may say that an income tax is a listing system. You just list your income—that is all. In this state, for some reason or other, you got it into your heads many years ago that a listing system was a very bad thing, and if any one says "listing system," you take to the woods. You think that an income tax is very much better, because that is not a listing system, but it is exactly the same thing, and it is just as inquisitorial as listing your property. The arguments on that point are really funny. If you go to Switzerland, where they have a listing system, you will find that they say the income tax is inquisitorial; and if you go to a place where they tax income, as in England, and do not tax any property except real estate and don't have any listing system on property, they will say that an income tax is all right, but that a property tax would be inquisitorial. It is all a matter of what you are accustomed to. There is no difference between the two, as far as being inquisitorial goes. You can get up a property tax law requiring listing, right down to an undershirt. You can also require the listing of every dividend on stock and interest on every bond, every fee that a doctor gets, and the fee of every lawyer for each case he tries; you can make either tax very greatly or very slightly inquisitorial. For instance, in Geneva every one returns his property at 37½cents per hundred—that is the highest rate. On small fortunes it is less. A man walks into the assessment office with a statement that is sent him and says: "I hereby certify on my honor that

my fortune does not exceed the sum of ——." That is all. He just writes down his total fortune, and that is the listing system. It does not go much into detail. In the Canton of Zürich he says, "I certify on my honor that my income is ——." He puts his income in the 90,000 franc class, if that is the amount of his income. The two things are equally inquisitorial. There is no difference in the manner of enforcing them. Administrative machinery that will enforce one will enforce the other. Poor administrative machinery that falls down with the one will fall down with the other. There is an immense amount of bunk and humbug talked about listing property for taxation. It isn't the pleasantest thing in the world, but you can list property or income without serious trouble, provided your tax rate is reasonable.

SOME PROBLEMS IN CONNECTION WITH FULL VALUATION

SAMUEL T. HOWE

From an address before the Assessors' Conference at Baton Rouge, Louisiana, January 6, 1919

PART II

Another cogent reason why the legal standard of actual value should measure assessments is because of its effect upon the welfare of the state at large. There is patriotism and state pride in every state which cause a desire among all citizens for the state to progress in all material ways and to grow in population and productive energies in the fruits of which all the citizens will have some share. When values are high the tax rate is low, and it is the rate of taxation that is usually first considered by would-be immigrants coming from another state. The tax rate is the salient feature; not often does the inquirer connect the rate with assessment values.

It seems to be a proper subject for unfavorable criticism, that demands upon the citizens to share in the expense of government and the contributions to the public fund which result are usually looked upon as unjust arbitrary requirements; rarely are tax payments made in the way of freewill offerings to finance governments for outlays required to conserve for the citizens civil liberty and the privileges of civil life. It is this desire to minimize tax payments that is often the direct incentive to movements of persons and property from one jurisdiction to another. As has been said, it is usually the rates of levy that have primary consideration.

Small communities are no longer self-contained. Through the modern industrial revolution and the attendant expansion of lines of communication and transportation larger communities having common interests have grown up in areas considerably outside the arbitrary boundaries of the small local political subdivisions of a state. In other words, there are state-wide common interests; the whole people have their laws from the legislature, and in the interest of the state-wide public it is important that the law-making body shall provide the largest degree of uniformity over the state in all matters that in the nature of things can be provided.

As to taxation, this is especially true of a state that has the general property tax where the sources of state and local revenues are not separated. The aggregate value of the whole state is the base upon which is laid the state tax rate, and from it the base for all local levies must be determined. In this connection a consideration of the inter-relations of the assessment and taxing districts of the state, both kinds not being always co-extensive, ought to convince any investigator that equal assessments over the whole state are necessary if there is to be just taxation.

The state district is, of course, the superior district, and the districts of political subdivisions such as parish, municipal, school, road, drainage, or others, may be classed as inferior districts, but they are all units, in so far as assessment is concerned, of the state district.

The so-called inferior districts may have, naturally, greatly varied rates of levy for identical local purposes, but even then

there is no justification for irregular variations from the standard which the law fixes for state purposes.

Experience teaches that too often departures from the legal standard come from a desire to shirk state taxes, or both state and county taxes, where the unit assessment district is smaller than the county.

In fixing the value of any particular item of property, the valuer does not first think of a fraction of actual value; it is inevitable that he shall first determine actual value, so if he departs from the legal standard of actual value he is open to the charge of having wilfully done so for some ulterior purpose.

In providing for the financing of any political subdivision of the state an essential preliminary is the preparation of a budget so constructed as to provide for the economical needs of the district. When the revenue required is thus ascertained the tax rate is, of course, to be determined by dividing the total assessed value into the required amount. If in parishes or other taxing districts there are different degrees in the varying of assessments from the legal standard the rates of levy upon properties of identical kinds will vary accordingly. In some districts the levy will be lower than in others because assessed values are higher, and in other districts the reverse will be true.

Unquestionably, as already has been said, there is a tendency among owners of movable property to transfer it to districts where the rate is low, and this motive causes much property to migrate to the districts seemingly favored by low rates, and those districts which have the high rates because of their lower assessments tend to lose taxable values. This merely states a fact proved by experience and is easily demonstrated.

At times different assessment authorities value property in the same assessment district, and this fact requires equal assessments of all property, and hence arises the necessity of co-operation between the different assessment authorities, and, failing co-operation, then authority somewhere lodged to secure equality. The state authority fixes the value of public service corporation property, the bulk of which is railroad property. In most jurisdictions assessed values of such property in excess of certain values which the law requires to be localized are distributed at an average rate per mile over the entire mileage system. If in a particular district in which the value of public service property is thus fixed local property is undervalued or overvalued, the resulting local taxation is not equitable. Possibly inequalities of this kind are avoided by the Louisiana system; however, in some sections of the country at large, corporations giving public service are exploited in tax matters for the purpose of benefiting local property owners; but in such cases it is inferential that the proposition is lost sight of, that taxes upon property of the kind are very largely, if not entirely, shifted to the consumers of the public service. Transportation, for instance, is a commodity bought and sold, and taxes are a part of the cost of production, and unless the tax be recovered from the patrons of the service the service will at least deteriorate and may fail entirely. The result in such cases is that users of the service are compelled to assume unjust burdens for the benefit of non-users.

Low assessments of real estate and of tangible personal property with consequent high rates of levy operate to exclude from the assessment roll intangible property because of the tendency among the owners of such property to avoid what they consider an unjust burden.

When the standard fixed by law is full value, underassessments open the way to a conclusion that the action of the valuer resulted from wrong motives. It may be argued that the underassessment was made to appease the property owner who objected strenuously to the standard value for fear his tax would be increased, but who gave not a thought to the proposition as to whether or not it should be increased in order to place him on a level with other taxpayers, or the conclusion may be that it was for other reasons equally objectionable.

The public must use legal standards in testing the work of its officers. No other way is open, if the interests of the social body are to be promoted; hence public servants will win approval or receive condemnation according as they conform to or vary from the standards.

An altogether too frequent source of inequality among individual taxpayers is in the relative unequal assessments of the poorer or less valuable properties in comparison with the assessments of the better

or more valuable properties. Inequalities of this kind are widely found and evidently any assessment which produces such a condition is open to the criticism that the practice obtains in order to favor owners of property of the more valuable kind who have political or other influence in greater measure than many of their less fortunate neighbors.

Experience has brought home the conviction that irregularities in values where a percentage is used are always greater in number than when full value is taken. With full value no calculation becomes necessary to determine the ups and downs in relation to a given percentage of what the law requires. And always when full value is taken the assessor holds himself up to view as having done legal and good work; not so when he departs from the legal standard.

As an example of what may be done toward attaining the legal standard of actual value and in equalizing assessments among the different classes of property, accomplished through the co-operation of all assessing authorities from those of the state downward under an appointive assessor system, results in Kansas are here presented.

In 1904 the Federal Census Bureau estimated the true value of all property in Kansas at the sum of $2,253,224,243. The assessment that year of all property in the state totaled $372,673,858, an amount slightly in excess of 16.50 per cent of the census bureau's estimate of true value.

The loose methods of assessment were severely criticized by taxpayers, some public officers, and by the press, and for twenty years or more prior to 1907 a reform in the system had been demanded from various sources.

In 1907 the legislature passed a law creating the tax commission and gave it general supervision over the work of assessment, and provided certain penalties intended to secure the valuation for tax purposes of all property at its actual value in money, as had always been required by law.

The assessment in 1907 of all property aggregated $425,281,214.

In 1908 the assessment totaled $2,451,360,397. The increase over the preceding year was produced by the appointed tax commission, by county assessors appointed in the several counties, and by appointed sub-district assessing officers all working harmoniously.

During the work of assessment for the year 1908 some of the loose methods theretofore prevailing were uncovered. For instance, it developed that one of the county assessors had lived forty-three years upon his farm and during the whole time the value of the farm for tax purposes had not been changed. The custom in that county and in many other counties prevailed among the assessors of copying from year to year the real estate assessed value of the preceding year, as the assessment for the current year, and seldom indeed was the assessment made after a view or inspection of the property as the law required.

It developed that it was customary for out-of-town assessors to go to the country crossroads store and there await the taxpayers, who, when they came, practically assessed themselves, and those who came not, did not get assessed.

Inequalities existing under the old plan were everywhere developed. The situation in one county is offered as an illustration. The *bona fide* consideration named in deeds transferring real estate, covering a period of five years, showed in the entire county an average assessed valuation of only 12.36 per cent of sale value. In one township of the county one farm was assessed at 3⅓ per cent of what it sold for. In the same township was another farm which was assessed at 80 per cent of the price at which it sold. For the county at large, that is among the twelve townships, the assessments ranged from 17 to 76 per cent of sale value.

The same condition as to assessment of lands was found to exist in all counties.

The property of a manufacturing corporation had been valued for several years by the local assessor at approximately $30,000. Under the supervision of the tax commission the property of this corporation was assessed at $1,100,000, in round numbers. And there were numerous instances discovered of previous undervaluations of this kind of property.

The rate of levy in 1907 for state tax was 6.456 mills, and in 1908 it dropped to nine-tenths of one mill. The average rate of local taxes in the state in 1907 was more than 4 per cent. In 1908 it dropped to 7.75 mills, or less than four-fifths of one per cent.

In order to prepare for the first assessment under the new plan provided by the legislature of 1907 the county assessor of each county was asked to report to the tax commission the date of sale, the description of the real estate sold, the consideration given in the deed, and the assessed value of the property for the year in which sold, and also the ratio of assessed value to sale value. The assessors were instructed to reject, in so far as was possible, all sales that were not *bona fide* sales with cash or equivalent actual money value considerations. The information thus gained was invaluable, the result being advice as to the sale values and the corresponding assessed values of five pieces of real estate for each of five years in all taxing districts of the state and thereby was afforded 40,000 ratios of assessed value to sale value.

The work of gathering and reporting these statistics was of incalculable benefit to the county assessors who had supervisory control over the local assessors, as it furnished them with a standard of true money value and aided them materially in their work of supervision.

Thereafter the county assessors were called to meet at the State Capitol and on roll-call every one of the 105 counties was represented by its county assessor in person.

This meeting was of great value because from it in great degree came the inspiration which controlled the county assessors in their work of supervision and in their own work of assessment, being personally charged with the duty of assessing intra-county telephone and pipe-line property, that is, all of that kind of property where the lines of the respective corporations were wholly within the county.

The spirit of co-operation engendered at this meeting worked splendidly, as is evidenced by the increase in assessment values above set forth.

Since the first meeting of the county assessors with the commission the meetings have been held biennially.

As before suggested, the result came from the work of practically all appointed assessing officers. Unfortunately politics entered the field and influenced successive legislatures to the extent of changing the law so as to devolve the duties of the theretofore appointive county assessors upon the county clerk, an elective officer, an *ex-officio* county assessor. At once problems multiplied because *ex-officio* duties are as a rule side issues and are not discharged with the zeal and fidelity which characterize the work of an officer specially in charge and directly responsible.

Almost immediately values began to decrease here and there, which necessitated the restoration of the lost values by the state board of equalization. Usually economic conditions operate alike over a large territory, but under the departure from the original plan some of the counties reduced their assessed values while adjoining counties raised them. Nevertheless through the spirit of co-operation of most of the county assessors, aided by the work of the state board, values have shown a constant upward tendency; the total assessment of all property in the state for the tax year 1918 having reached the sum of $3,418,798,222.

In 1912 the commission prepared a special form of real estate assessment blank which required a classification of farm real estate. Owing to the machinery through which the classification must be produced—some 1,500 or more rural assessors—perfect work was of doubtful accomplishment, but the result was surprising in the degree of accuracy achieved, and ever since this information was gathered it has proved an invaluable aid to the state board of equalization, in equalizing the state-wide assessment of rural lands.

The commission had succeeded in having the statute amended so as to provide for the separate assessment of land and improvements, and the commission was authorized to prescribe a field-book for use in gathering and reporting the data desired.

Economists and practical administrators are substantially agreed that the attainment of actual money value of real estate in an assessment will be greatly promoted, especially in the rural districts, by having each assessing officer supplied with a land map so arranged that for each taxable tract there may be designated thereon the acreages which are distinctly different in kind and quality, with due regard to topography, soil conditions, etc.

In few states, however, has legislation progressed to the point of providing for the use of such maps. It needs no argument to show that by the use of maps of this kind true value can be more closely determined than in any other way. Always is there a community opinion as to the

value of different grades of land whether waste, stony, alluvial, upland, forest, or other kind. Of course, to be exact there should be a survey of the lands, but every owner knows proximately the acres of his land which fall into the subdivisions above suggested.

Tax maps for the assessment of real estate in cities have been used here and there for many years. Experience teaches that the best assessments result when they are based upon land map data carefully compiled as to actual value.

The first assessment made under the supervision of the tax commission was in 1908. In 1908 the legislature convened in special session, and the law with respect to values fixed by the state board of equalization was changed by adding this provision:

"Whenever the valuation of any taxing district, whether it be a county, township, city, school district or otherwise, is changed by the State Board of Equalization, the officers of such taxing district who have authority to levy taxes are required to use the valuation so fixed by the state board as a basis for making their levies for all purposes."

A new law was passed, not exactly as the bill was prepared by the commission, but in effect the same, the important part of which was as follows:

"That it shall be unlawful for any board of county commissioners or any county officer; any township board of any township officer; any city council, board of education of any city, or any officer thereof; or any school district, or any other taxing district or any officer thereof that is authorized, or whose duties it may be under the laws of the state, to fix or make any levy on the assessed valuation of property for the purpose of taxation, to fix or make any levy upon the assessed valuation of the property within their respective municipalities or taxing districts that will produce a sum of money in excess of two per cent more than a sum that would have been produced by the levy of the maximum rate now provided by law on the assessed valuation of the property of their respective municipalities or taxing districts for the year 1907; provided, that the State Tax Commission — upon application by the board of county commissioners of any county, the mayor and council of any city, or the board of education of any city, after such notice to the voters therein as said Tax Commission may prescribe, and upon a showing of the necessity therefor — may fix a greater sum to be raised by taxation for any lawful purpose in such municipality or taxing district as hereinbefore provided, any may make and fix such an additional levy, not in excess of the limit heretofore provided by law for such purpose, as will be necessary to produce such greater sum; and provided further, that the electors of any county, township, school or other taxing district, by a direct vote, may authorize such increase in any levy for any such purpose as they may deem best, not in excess of the levy heretofore fixed by law for such purpose."

Levies for sinking and interest funds were not limited by the new law.

It was made unlawful for the county clerk of any county to enter upon the tax roll any levy made in violation of the provisions of the act and a suitable penalty was provided for violation of the law. The natural result was a decrease in levies for all purposes to the extent necessary to make them harmonize with the increased values.

During the year 1908 all sections of the law which provided levies, no matter for what purpose, with the exception of sinking and interest funds, were carefully studied and a bill was prepared and passed by the legislature of 1909 which limited all levies to correspond with the increased values. In the law it was provided that in any taxing district three-fourths of the votes cast at an election called for the purpose—the notice of which election gave any proposed increase of levy—might order such increase. The tendency of these new provisions of law was, of course, to cause actual values to be reached in the assessment. A law similar to the last one suggested was afterward used with good effect in Colorado.

It may be that the antecedents and institutions of Louisiana are such as at present prohibit the use of such measures, but if they can be made available they will prove very helpful in getting property assessed at actual value.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME TAX ON ASSOCIATIONS—MASSACHUSETTS TRUSTS.—In reversing the judgment of the Circuit Court of Appeals (250 Fed. 817) and affirming that of the District Court, the Supreme Court has ruled that a real estate trust of the kind familiar in Massachusetts, is not a joint stock association within the meaning of the income tax law of 1913. The arrangement was that certain real estate was conveyed to trustees subject to a long-term lease of the same, the consideration being the stock of the lessee corporation, which was left in the hands of the trustees. The trustees were given wide powers of management, with the direction to pay over the income represented by the dividends, to beneficiaries who had no general control over the management of the property conveyed. This arrangement, being clearly a trust in Massachusetts and nothing more (*Williams* v. *Milton*, 215 Mass. 1, 10, 11; *ibid.*, 8), the question was whether a different view was required by the act in question, and in view of the double liability for tax on dividends of an association, it was held that the language of the statute must make the intention clear (*Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Isham*, 17 Wall. 496, 504). The trust was held not to fall under any familiar conception of a joint-stock association, whether formed under a statute or not (*Smith* v. *Anderson*, 15 Ch. D. 247, 273, 274, 277, 282; *Eliot* v. *Freeman*, 220 U. S. 178, 186). The beneficiaries could not well be so designated when they were admitted not to be partners and to have no joint action and no control over the fund. Neither could the trustees, by themselves, be an association unless all trustees with discretionary powers are such, which would make the special provisions for trustees in section II D of the act meaningless. The apparent reason for taxing dividends received by corporations — to discourage combinations "now in disfavor" — was not applicable, and so upon the whole case the court was of the view that the statute failed to show a clear intent to subject the dividends on the lessee corporation's stock in the hands of the trustees, to the extra tax imposed by section G (a) of the act. A collateral question, not decided by the lower court, was the claim by the government that at least it was entitled to retain the tax which the trustees should have paid as trustees. As to this the court held that the statute was not clear, and hence the recovery should be allowed for the entire amount (Rev. Sts., § 989). If the United States retains from the amount received by it the amount which it should have received, it cannot recover that sum in a subsequent suit.—*Crocker et al.* v. *Malley*, U. S. Sup. Ct., March 17, 1919.

INCOME TAX—STOCK DIVIDENDS.—The much discussed question of the taxability of stock dividends as income under the 1916 law is progressing towards a determination by the United States Supreme Court. On January 23rd, upon the argument in the District Court, Southern District of New York, of the test case of *Macomber* v. *Eisner*, Judge Mayer overruled the demurrer of the Government. His opinion appears simply as an endorsement, "Demurrer overruled on the authority of *Towne* v. *Eisner*, 245 U. S. 418. See also *Peabody* v. *Eisner*, 247 U. S. 347."

Upon the argument the Judge interrupted counsel to say that he was asked to declare that the United States Supreme Court had made an error in the Towne case, which he declined to do; that the decision seemed perfectly clear to him, and if the court wanted to change its mind it must do so itself.

The case is now on the docket of the Supreme Court as No. 914 and has been advanced and set down for argument on April 14.

PROFITS TAXES—INVESTED CAPITAL.—Those concerned with this important feature of the federal tax laws will doubtless find interest in the article by Frederick Thulin in the January and February numbers of the *Michigan Law Review*, in which

he discusses at length the various questions arising with respect to the allowances for tangible and intangible property issued for stock.

Income Tax—Non-Residents. — The case of *Shaffer* v. *Howard*, the decision of which was expected to throw considerable light on the question of the powers of states with respect to the taxation of income derived by non-residents within the state, has turned out to be useless for this purpose. On March 10, 1919, the U. S. Supreme Court, in a *per curiam* opinion, reversed the decree and remanded the cause with directions to dismiss the bill for want of proper parties.—See Bull. IV, 58 and 250 Fed. 873.

Gross Receipts — Foreign Corporations—Interstate Commerce. — We are so familiar with the rule of the United States Supreme Court that a foreign corporation engaged exclusively in interstate commerce, is not subject to a state license or franchise tax on the exercise of its corporate franchises and the transaction of its business in such state, that a decision of the New York Appellate Division (Third Department) sustaining such a tax, comes as a surprise. The case is unusual in that it involved a Pennsylvania gas company distributing gas from its Pennsylvania plant through pipes to consumers in New York. That such business is interstate commerce, and that the state of origin cannot forbid or unreasonably hinder the transmission to other states are propositions established by the decision in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, and we may now add the authority of the decision in *Public Utilities Com. of Kansas* v. *Landon, Receiver*, decided March 17, 1919, in which this case was cited, and also *Am. Express Co.* v. *Iowa*, 196 U. S. 133, 142, and *Haskell* v. *Kan. Nat. Gas Co.*, 224 U. S. 217. It would seem to follow that the state of destination is equally impotent to prevent the entry and distribution of the gas. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, appears to establish a doctrine of "continuous voyage" for such a commodity. The majority of the court, therefore, seem unwarranted in their indispensable major premise that "the relator has acquired from the state a valuable property right, which the state was not bound to concede, but which it was willing to give for a consideration." Unless this premise can stand, the tax is invalid, by existing standards, for it was assessed by taking a percentage of the gross receipts, all of which were from interstate commerce. The only exception to the immunity of such receipts from state taxation is when the tax is in lieu of a property tax. No such possibility of sustaining the tax in question was adverted to in the opinion of the court, which fails to observe that the corporation was engaged exclusively in interstate commerce, and relies on *New York State* v. *Roberts*, 171 U. S. 638, in which the tax was not measured by gross receipts and the business of the complainant was not exclusively interstate.

It is evident that this judgment can receive the approval of the United States Supreme Court only upon some theory not thus far developed. There is undoubtedly something to be said in favor of special rules for such enterprises as the furnishing of gas, water, and electricity across state lines. Yet the court does not consider all the elements of the situation when it points out that there was no unfair discrimination against interstate commerce. If the state of destination may take a percentage of the gross receipts, so may the state of origin. The same is true of a percentage of the net income. The fairest method of taxing such interstate business is to allow the state of origin and the state of destination to take their equitable proportions of the net income earned by the combined activities in the two states. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, allows the state of origin of interstate sales to tax the entire net income from the manufacture and sale through the medium of a statewide income tax which levies on all net income except that from a few kinds of business which are subjected to other equivalent burdens. Whether the same permission will be accorded to the state in which the interstate commerce terminates remains to be seen. But the *Oak Creek* case contains the strongest implication that gross income stands on an entirely different footing than net income. Under existing law, the only legitimate method for New York to adopt to tax the business of a foreign corporation engaged exclusively in interstate commerce is to impose a tax in lieu of a property tax or to assess the property by

a capitalization of its earnings. If this decision is to be affirmed, it will have to be on some ground not mentioned in the majority opinion. — *People ex rel. Pennsylvania Gas Co.* v. *Saxe*, 174 N. Y. Supp. 102. [Above kindly furnished by Thomas R. Powell.]

License Taxes — Interstate Commerce — Telegraph Companies. — The legality of city license taxes when imposed upon corporations engaged in interstate commerce, has been the subject of much litigation. In a recent case a telegraph company contested such a tax, asserting its freedom from liability by reason of having accepted the Post Roads Act, and further, that as the cost of doing intra-state business was greater than the receipts from that business, the taxes, if paid at all, must be paid from the receipts from intra-state commerce, thus imposing an unconstitutional burden upon such commerce. The taxes in question were a flat annual license tax of $300, imposed for the privilege of doing business within the city, the ordinance expressly exempting the privilege of doing interstate business and business for the United States Government, and an annual tax of $2 for each pole maintained or used in the streets of the city.

The court held that except for the question of the claimed unreasonable burden upon interstate commerce the case could be disposed of on the authority of decided cases. The power to impose the tax was held clearly established (*Postal Tel. Cable Co.* v. *Norfolk*, 101 Va. 125; *Same* v. *Same*, 118 Va. 455), and since interstate business and government business were expressly excluded, the validity of such a tax was sustained by the decisions in *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692; *Emert* v. *Missouri*, 156 U. S. 296; *Kehrer* v. *Stewart*, 197 U. S. 60; *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, and *Williams* v. *Talladega*, 226 U. S. 404, 416.

The principle was stated to be that a state may lawfully impose a license tax restricted to the right to do local business "where such tax does not burden, or discriminate against interstate business and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce." Such a tax is not a mere inspection fee limited by the cost of inspection but "an exercise of the police power of the state for revenue purposes" (citing the above cases and *W. U. Tel. Co.* v. *Alabama State Board, &c.*, 132 U. S. 472, 473).

A statute of Virginia compels all telegraph companies to transmit all messages tendered, whether inter-state or intra-state in character, and the court holds that if the facts were, as argued, that the net receipts from intra-state traffic were insufficient to pay the tax and that it must be paid from interstate receipts, "it might well be that the tax would be invalid *Pullman Co.* v. *Adams*, 189 U. S. 420; *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, but a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce, which is necessary to justify a finding that the ordinance is unconstitutional and void."

The further question of the legality of the tax on the poles in the streets was held practically concluded by prior decisions sustaining the validity of such a tax when reasonable in amount and when the charges are reasonably proportionate to the service to be rendered and the liabilities involved and when not a disguised attempt to impose a burden on interstate commerce. The principle involved is declared to be that while a telegraph company engaged in interstate commerce and which has accepted the Post Roads Act cannot be denied the occupation of the streets, as the use is necessarily permanent and exclusive in character, differing from the use by the general public, "imposing contingent liabilities upon the city, it is competent for the city in the exercise of its police power to exact reasonable compensation 'in the nature of rentals' for the use of the streets, having regard to the duties and responsibilities which such use imposes on the municipality." Even if the net returns from intra-state business should not equal the tax, this alone would not be conclusive against its validity. "Even interstate business must pay its way—in this case for its right of way and the expense to others incident to the use of it." The compensation should include the expense of such inspection and supervision as is reasonably necessary to secure the safety of the public but

with authority in the courts to determine their reasonableness.

The court expressly negatives any intention to modify in the least the law as it has been stated in many cases that "neither licenses nor direct taxes of any kind nor any system of state regulation can be imposed upon interstate commerce; and that all acts of legislation producing any such result are unconstitutional and void," citing *Crutcher* v. *Kentucky*, 141 U. S. 47, 62, and *W. U. Tel. Co.* v. *Kansas*, 216 U. S. 1. But such laws cannot be declared void except upon clear evidence, which the court finds is lacking in this case, in which the taxes were, as it says, assailed "upon inadequate evidence and upon purely empirical calculations." — *Postal Telegraph-Cable Co.* v. *Richmond*, U. S. Sup. Ct., March 17, 1919.

License Taxes. — By dismissing, for lack of jurisdiction, writs of error to review judgments rendered by the District Court for Alaska, the United States Supreme Court has left these judgments in force. The cases involve a consideration of the power of the territory of Alaska to impose license taxes and the effects of the statutes imposing such taxes upon the businesses in question, which were fisheries and salmon-packing industries. The decisions of the District Court are reported in 236 Fed. 52, 62, and 70, and contain useful references to the leading cases. One suggestion of novelty is as to the procedure to be observed in enforcing a license tax when it is impossible to determine the amount of the tax in advance. Some doubt has been thrown upon the possibility of legally collecting a tax imposed upon the privilege of conducting a business, after the expiration of the license year. The court, in the decision in question, suggests that the appropriate procedure in a case where the amount of the license fee cannot be computed in advance, is to require the subject of the tax to make application for a license before doing business, the payment, where necessary, to be deferred until the determination of the amount can be made (236 Fed. at p. 72).—*Alaska Pacific Fisheries* v. *Territory of Alaska; Alaska Salmon Co.* v. *Territory of Alaska.* Writs of error dismissed and judgments of the Circuit Court of Appeals made final.—U. S. Sup. Ct., March 3, 1919.

Police Power versus Taxing Power. —The United States Supreme Court has recently reiterated its refusal, frequently expressed, to enter into the niceties of the distinction between the police power and the taxing power and its general rule of sustaining laws passed in the exercise of the taxing power if they have some reasonable relation to the exercise of the taxing authority conferred by the constitution, even though such laws may have been enacted through other motives or may accomplish another purpose than the raising of revenue. The case arose through an indictment for violation of the Narcotic Drug Act (38 Stat. 785, § 2) which was passed pursuant to the authority of article I, section 8, of the constitution, providing for the imposition of "taxes, duties, imposts and excises." The court refers to the broad powers of Congress under the clause in question and to the sole limitation as to uniformity (License Tax Cases, 5 Wall. 462, 471) and proceeds to assert the principles referred to above, citing *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156; *In re Kollock*, 165 U. S. 526, 536; and *United States* v. *Gin Fuey Moy*, 241 U. S. 394, 402, arriving at the conclusion that the act in question had a reasonable relation to the end sought to be reached, to wit: the suppression of the opium traffic and that Congress was within its rights when it determined that this end could best be attained through the exercise of the taxing power.

It is of interest to note that the Chief Justice, with whom Justices Van Deventer and Reynolds concurred, dissented, being of the opinion that the act, as sought to be applied in the case, was beyond the constitutional power of Congress because to such extent the statute was a mere attempt of Congress to exert a power not delegated, that is, the reserved police power of the states as held by the District Court (246 Fed. 958).—*United States* v. *Doremus*, U. S. Sup. Ct., March 3, 1919.

Highway Commissions — Constitutionality of State Road Taxes—"Uniformity."—By an act of the legislature of Indiana (Acts 1917, p. 253) a State Highway Commission was created with power to designate certain highways as main high-

ways to be improved pursuant to the provisions of the act. Action pursuant to this law was recently sought to be enjoined by a property owner in a county in which one of these highways had been designated for improvement, funds for which were in part to be obtained by the issuance of bonds to be liquidated by a general levy upon all the property in the county. One ground of complaint was that there was lack of due process because the property owner was not given opportunity to be heard in proceedings to determine the amount which he was to pay. The court, referring to its previous decision (*Harmon* v. *Bolley*, 120 N. E. 33), upholding the right to notice and opportunity to be heard before an assessment can be legally imposed, calls attention to the fact that this rule applies only to special assessments made against specific property and has no application to the exercise of the general taxing power of the state or of any of its municipal subdivisions; that the general advantages of government are of such a nature that they cannot be measured in dollars and cents and that the power to tax for such purposes is not limited to actual benefits resulting to the citizen but only by governmental needs (*Kelly* v. *Pittsburgh*, 104 U. S. 78). The power to determine whether a given improvement is general in its character or special and whether the funds shall be raised by general taxation or by special assessments or in part by each method, is legislative in character and the action of the legislature is binding on other departments of government.

The method adopted in this case was held to be by general taxation of all property in the county, creating a personal liability and a general lien on the real and personal property situated in the county. The imposition of such a tax does not require notice and hearing (*Lake Shore &c. R. Co.* v. *Smith*, 31 N. E. 196).

The act was held not to conflict with the uniformity clause of the state constitution (art. 10, sec. 1). The fact that the rates in counties where such improvements are made may be greater than in other counties, does not signify that the rates are not "*uniform*" within the meaning of the constitution, as each county is a separate unit for the purposes of taxation. A further vague ground of attack upon the act in question was that it invaded the "reserved powers of the people." The court easily disposes of this question by the suggestion of the result which would happen if it were to prevail and if the general legislative power conferred by the constitution were held to be limited in some unexpressed manner.—*Wright et al.* v. *House*, 121 N. E. 433.

Uniformity and Equality — Equitable Relief. — In a recent Illinois case the general principles established by the United States Supreme Court in the Kentucky franchise tax cases were followed and an assessment was held so grossly disproportional to assessments of other properties, as to be illegal and was reduced to a sum which would produce the required equality. The following principles were announced by the court:

The dominant idea of the constitutional provision requiring needed revenue to be provided by the levy of a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property, is uniformity of taxation, and where assessors have disregarded the injunction of the law and made an assessment of property far below its real cash value, their misconduct must also follow the principle of uniformity, and their assessment of all persons must be at the same proportional value. *Bureau County* v. *Chicago, Burlington & Quincy R. R. Co.*, 44 Ill. 229; *Chicago & Northwestern Railway Co.* v. *Boone County*, 44 Ill. 240; *Darling* v. *Gunn*, 50 Ill. 424; *Chicago & Alton R. R. Co.* v. *Livingston County*, 68 Ill. 458; *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U. S. 350.

Intentional and systematic undervaluation of other taxable property within a state, violates as to one taxed on the full value of his property, the equal protection of law guaranteed by Const. U. S. Amend. 14.

No difference in judgment as to the value of property, however gross, between the state board of equalization and the court, can be sufficient to impeach the valuation of the board, but to have such effect the assessment must have been fraudulently made.

An overvaluation may be so excessive and made under such circumstances as to justify the conclusion that it was not honestly made. A wilful disregard by mem-

bers of the state board of equalization of a known duty for the purpose of producing a result which could not otherwise have been produced, may be urged against an assessment as a fraud. *Keokuk Bridge Co.* v. *People*, 44 N. E. 206; *First National Bank* v. *Holmes*, 92 N. E. 893; *City of Chicago* v. *Burtice*, 24 Ill. 489; *East St. Louis &c. Ry. Co.* v. *People*, 10 N. E. 397.

Members of the state board of equalization are competent to testify as to methods followed in making assessments despite objections that it involves impeachment of an official record.

A court of equity will enjoin the collection of a tax where the tax is not authorized by law, where it is assessed on property not subject to taxation, and where the property has been fraudulently assessed at too high a rate. *Porter* v. *Rockford, Rock Island & St. Louis R. R. Co.*, 76 Ill. 561; *Chicago, Burlington & Quincy R. R. Co.* v. *Cole*, 75 Ill. 591; *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 602; *New Haven Clock Co.* v. *Kochersperger*, 51 N. E. 629; *Calumet & Chicago Canal & Dock Co.* v. *Stuckart*, 113 N. E. 894.

An assessment is at too high a rate within the constitutional right to uniformity, even though based on less than the actual value, when the property is assessed at a greater proportion of its actual value than is used in the assessment of other property.

An assessment of the capital stock of a corporation is invalid where the state board of equalization has arbitrarily disregarded its rules and assessed the stock at a high valuation, in disregard of its rules applied to the stock of other corporations.—*People's Gaslight & Coke Co.* v. *Stuckart*, 121 N. E. 629.

Uniformity—Classification—"Property"—Oil Leases.—A case which raises several interesting points, is that recently decided by the Kentucky Court of Appeals. The facts were that a non-resident owned certain oil leases located on the lands of separate owners. He had opened wells, and these were being operated and the production tax on the oil was being collected. The Board of Supervisors, after allowing 5 acres of land surrounding each well, assessed the remaining leased land at a total sum, lumping all parcels together.

Various objections were raised. It was contended that non-residents were discriminated against by reason of the fact that while such leases were taxable to every owner under a special statute (Ky. Stat., vol. 3, § 4039) in the form of list set out in full in the general tax law for residents, there was no specific requirement to schedule these leases. The court held, referring to the constitutional provision, that all property, not exempted, should be assessed (Const., § 172), that there could be no exemption of this property, even if the requirement for listing this specific kind of property was omitted; and further, that the general provision in the statutes that "all real and personal estate" should be subject to taxation, unless exempt by the Constitution, conferred ample powers to assess this property. They also found in the form of schedule provided in the statute an item "value of all property not mentioned," which they held in any event to cover this property.

Another contention pressed was that these leases were not "property" within the meaning of that word as found in the Constitution; that, being mere privileges, they could not be deemed property until after wells had been drilled and oil found. In discussing this, the court makes helpful references to the use of this word property, citing its definition as previously made in *Commonwealth v. Ky. Distilleries &c. Co.*, 143 Ky. 314, and those contained in Bouvier's *Law Dictionary*, and an article in 32 Cyc. 648, declaring that the word as used in taxing statutes "embraces everything which is the subject of ownership and has an exchangeable value" unless limited by the statute in question; that under the Kentucky constitutional and statutory provisions it embraces only "property that has a cash value and may be the subject of barter and sale." Proceeding to determine this question, the court holds that the question of whether these leases have a market or cash value is one of fact, to be decided as other controverted facts are decided. The decisions in *Wolf County* v. *Beckett*, 127 Ky. 252, and *Mt. Sterling Oil and Gas Co.* v. *Ratliff*, 127 Ky. 1, are held to clearly recognize the assessable character of these leases covering undeveloped territory which have a cash value and which could be sold at a fair voluntary sale.

The further claim was made that these leases should not be assessed because the oil production tax, imposed by § 4223c,

Kentucky Statutes, was intended to and does include the value of the lease on the property from which the oil is produced. The discussion of this point opens up an interesting field of inquiry as to whether a license tax or franchise tax may be levied in lieu of a property tax even under a constitutional provision permitting classification. The court holds that these taxes cannot result in the exemption of property, unless a definite classification has been made of such property, which had not been done in this case except through the oil production tax law. This determination was rested upon the decision in *Levi* v. *Louisville*, 97 Ky. 394, decided under the constitutional provision (Const., sec. 171) previous to its amendment in 1915, but the court holds that even when classification is provided, there is no power to exempt taxable property by the adoption of a license or franchise tax, *unless* a classification of the property so attempted to be exempted is made, and all similar property is brought into the class; that it was no more allowable to substitute a license for an ad valorem tax under the amendment permitting classification than it was before the amendment; that the authority for the production tax was not found in the classification amendment but in another different section (§ 181), expressly permitting license taxes. The cases sustaining license taxes in addition to property taxes were reviewed and the leading cases cited.

Consequently, the authority to make the assessment in question was sustained, but the court held that the leases constituted separate pieces of property and should have been assessed separately and not in a lump sum as was done. The case was accordingly sent back with directions to proceed in conformity with this view.—*Raydure* v. *Board of Supervisors*, 183 Ky. 84 (Adv. Sheets), 209 S. W. 19.

Credits—Unpaid Balance of Amount Due on Option to Purchase.—The nature of a contract for the sale of property, delivery to be made in the future, and the character of amounts due on the agreed purchase price, were recently the subject of a decision by the Montana supreme court. It was held that, under the facts in the case, the parties intended and understood that the vendor granted only the right to exercise an option and that it created no enforceable indebtedness, and therefore the amount due and unpaid was not a "credit" coming within the class of taxable property as a solvent debt secured and unsecured. The question was stated to be a new one to the court, although considered in other jurisdictions, and they cited *Dallas County* v. *Boyd*, 116 N. W. 700; *Griffin* v. *Board of Review*, 56 N. E. 397; *Tessier* v. *Nashua*, 78 Atl. 495; and *McGregor* v. *Ireland*, 121 Pac. 358, as illustrative cases presenting the conflicting views.—*Read* v. *Lewis and Clark County*, 178 Pac. 177.

Exemptions — Municipal Securities. —The question of the right of a state to tax bonds of a municipal corporation thereof, was recently decided in the negative by the South Dakota supreme court. It was conceded that there was no express exemption and that the bonds in question were "public securities," the taxation of which was expressly provided for. It was further conceded by the court that these bonds came within the term "property" as used in the Constitution and that, as all "property," except that expressly exempted, was subject to taxation, "unless because of some rule of public policy—some superior intervening right or reason—it will be presumed that the term 'property,' as used in the Constitution, was not intended to include public securities or some class or classes thereof."

The court further rejects the suggestion that to tax such securities would be to impair the obligation of a contract, expressing its full concurrence with the leading authority, *Champaign County Bank* v. *Smith*, 7 Ohio St. 42. They suggest that the courts which have held that such bonds were taxable under similar circumstances, have failed to give due consideration to the result of such holdings; that thereby the state, by the exercise of one of its functions—taxation—cripples another, quoting from Justice Marshall in *Weston* v. *Charleston*, 2 Pet. 449, 468, and citing *Pollock* v. *F. L. & T. Co.*, 157 U. S. 429, 586; *Pennick* v. *Foster*, 53 S. E. 773; *In re First Nat. Bk.*, 160 Pac. 469; *Farmers Bank* v. *Minn.*, 232 U. S. 516; and *Mercantile Bk.* v. *New York*, 121 U. S. 138, 162.

The conclusion is that while the word "property" is general enough to include the securities, such a meaning was not intended, quoting at length from *State* v.

Board of Assessors, 35 La. Ann. 651. Summarizing its view the court says in conclusion:

"If we were to consider the bonds before us merely as property and disregard the purpose for which they were issued—disregard the fact that they are governmental instrumentalities — we should hold them taxable; but when we regard them not merely as property, but as governmental instrumentalities of a sovereign state, a superior intervening public policy grounded upon one of the sovereign powers of the state, compels us to the conclusion (there being no express language in the Constitution to the contrary) that the public securities of a state, and of its counties and municipalities, were not intended to be included either in the term 'property' or the term 'bond' as such terms are used in that article of our Constitution relating to taxation."—*National Surety Co.* v. *Starkey*, 170 N. W. 582.

Market Value — Two Meanings of the Expression. — The meaning to be given to the expression "market value" when used in reference to property which is not commonly dealt with in the market, and how the market value of such property shall be determined, has often been found a perplexing question. A recent decision explains that the expression has really two distinct meanings, one primary and the other figurative, and shows that this distinction has a very important bearing upon the kinds of evidence admissible to establish such value. This throws a much clearer light upon the whole question. The court says:

"The term 'market value,' as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions as to standardize the price. Proof of such a market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it. The term is, however, frequently used in a figurative sense, as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt. This is the meaning which the term usually has when applied to real property. To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the fair and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term. Private dealings in property can never be used to show market value in the primary sense, and when used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value. No text-writer or court has been discovered which supports any such doctrine. The distinction between the two meanings attached to the term 'market value' is now found in the elementary works (*Chamberlayne on Evidence*, secs. 2099-h, 2099-i)."

The matter under investigation was a proceeding to condemn a right of way for a telegraph line over a railroad right of way.

"In such a case," the court says, "all that can be done is to aid the jury by the opinions of men who are shown to have opinions which will prove, in the judgment of the trial court, a help to the jury, and to present the various features of the property." The elements which witnesses may properly bring forward in such a case are those which experienced and intelligent business men would present if they were negotiating with respect to the property in question (*Boom Co.* v. *Patterson*, 98 U. S. 403; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 77). When the minds of jurymen have been enlightened by such evidence and opinions, their composite judgment constitutes the 'fair compensation' referred to in our constitutions. Judges cannot properly make a schedule of the elements which may be brought before a jury by experienced men to aid them in making their assessments. The rule and the elements for its application must be adapted to the subject matter that is under investigation." — *North Am. Tel. Co.* v. *Nor. Pac. Ry. Co.*, 254 Fed. 417.

Special Assessments — Foot-Front Method—Notice.—Assessments for pav-

ing levied upon adjacent property pursuant to the charter provisions of St. Louis were recently attacked upon the ground that no opportunity was given the property owner to be heard as to the validity and apportionment of the assessment and because the effect of the assessment was to cast upon complainant an unreasonable and arbitrary burden. The validity of the assessments was upheld by the state supreme court (269 Mo. 546) and the case was taken to the United States Supreme Court on writ of error.

The court refers to previous litigation involving the validity of the "foot-front" method of assessment, resulting in its approval (*Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55; 245 U. S. 288). Whether the lack of notice and opportunity to be heard was a valid objection, was held to depend upon the authority under which the assessment was made. If made in accordance with a fixed rule adopted by a legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred (*French* v. *Barber &c. Co.*, 181 U. S. 324; *Embree* v. *Kansas City Road District*, 240 U. S. 242; *Wagner* v. *Baltimore*, 239 U. S. 207, 217, 218). As the charter of the city of St. Louis was adopted by direct vote of the people, under constitutional authority, assessments made pursuant thereto were held to be legislative in character, and hence no previous notice or preliminary hearing as to benefits was necessary.

On the question of arbitrary action and abuse of power, resulting in lack of due process, the court was evidently content to follow the state court, which found no evidence to sustain the contentions made in this regard.—*Withnell* v. *Ruecking Const. Co.*, U. S. Sup. Ct., March 3, 1919.

Priority of Lien for Taxes in Bankruptcy Proceedings.—At the time of the appointment of a receiver in bankruptcy, taxes assessed upon the bankrupt's personal property for three years were due the city of Richmond, Virginia, for which it had not distrained, although having authority to do so. Two or three days prior to the appointment, the bankrupt's landlord levied a distress warrant upon its goods and chattels on account of arrears of rent. The question before the court was whether this claim was entitled to priority over the taxes. The lower court answered in the affirmative (240 Fed. 545).

The city claimed priority under section 64-a of the Bankruptcy Act, which provides that the "court shall order the trustee to pay all taxes legally due." The landlord maintained that his lien was protected by section 67-d of the act which provides that liens recorded "shall not be affected by this act," and also that under Virginia law such a lien was superior to the inchoate one which the city had not perfected.

The court referred to the decision of the state supreme court that the city had no lien for past due taxes upon these goods and chattels when the receiver took possession, as announced in *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 40, and hence that section 64-a of the act above referred to, must be read in view of the positive provisions of section 67-d, and that Congress did not intend that its provisions should be held to place taxes ahead of a lien which by the state law was superior to the lien for taxes.—*City of Richmond v. Bird &c.*, U. S. Sup. Ct., March 3, 1919.

Bank Taxation. — The U. S. Supreme Court, on January 7, 1919, dismissed the appeal in the case of *Magnolia Bank* v. *Board of Supervisors* on the authority of § 237, Judicial Code, as amended by Ch. 448, 39 S. L. 726, Sept. 6, 1916. (See Bulletin II, 82 and 72 So. 697.)

Governmental Agencies. — On January 27, 1919, the U. S. Supreme Court reversed the judgment of the state court in *Large Oil Co.* v. *Howard*, upon the authority of *Choctaw & Gulf R. R. Co.* v. *Harrison* (235 U. S. 292); *Ind. Ter. Illum. Oil Co.* v. *Oklahoma* (240 U. S. 522), citing also *Oklahoma* v. *Oil Cos.* (247 U. S. 503.—See *Bull.* II, 232 and 163 Pac. 537.

BOOK REVIEWS

MONTGOMERY'S INCOME TAX PROCEDURE [1]

It is sufficient merely to announce the appearance of the new edition of Col. Montgomery's book; to describe it, much less to "review" it, are both unnecessary and unimportant. The earlier editions have established the authoritative and helpful character of the volume and have made it almost if not quite an essential part of the equipment of everyone having a responsibility for intelligent compliance with the requirements of the present federal tax laws. For the work is not merely an income tax manual; it deals fully and exhaustively with the profits tax schedule as well as with the capital stock tax as they appear in the recent enactment by Congress known as the Revenue Act of 1918 which was approved February 24, 1919.

Members of this Association will recall that Col. Montgomery was a member of the committee which made the report to the 1915 conference, on the income tax law. The recommendations of that committee have now virtually all been adopted in the present form of that law. He took an active part in the deliberations of that committee and his familiarity with the technical accounting details was most decidedly helpful to the other members.

The present edition ties the experience under the previous acts to the provisions of the present act in a definite manner so that under each section, the text of the law, the entire body of administrative rulings, the court interpretations and the practical observations of the trained accountant and lawyer, appear together. This treatment will commend itself to one who has occasion to deal exhaustively with the subject, and under existing rates superficial study is out of the question.

One of the chief characteristics of this edition is the repeated interjection of practical hints for the handling of accounts so as to produce results which will meet the requirements of the law and the regulations and at the same time protect the taxpayer from the machinery of a system of accounting which may not at all points harmonize with the arbitrary requirements of the statute and which would, if followed blindly, work injustice and involve the taxpayer in the expense and labor of claims and appeals.

The book is largely increased in size over the last edition, containing over 1000 pages, and yet it is not bulky, and a careful and complete index enables ready reference to any point of inquiry.

Not the least interesting to our members is the introduction, which the author says is largely the work of our member, Professor Robert M. Haig, of Columbia University. He gives a concise and yet a comprehensive review of the history of income tax legislation with definite references to the various federal acts as well as to the state income tax laws. This introduction will be found helpful to those whose duties involve a consideration of the fiscal needs of the various states.

The chapters on withholding at source, fiduciaries and non-resident aliens are largely the work of Mr. James Rattray, of the Guaranty Trust Company, and thus these matters are discussed and explained by one whose duties have been to deal practically with them. The book is bound in flexible covers, is well printed, and is what we would call a "comfortable" volume to handle.—A. E. H.

[1] Income Tax Procedure—1919, by Robert H. Montgomery of New York City, attorney-at-law and C. P. A.; pp. 979. Price, $6.00. The Ronald Press, New York.

HOLMES FEDERAL INCOME AND PROFITS TAXES [1]

[1] Holmes Federal Income Tax, War-Profits and Excess-Profits Taxes—including stamp taxes, capital stock tax, tax on employment of child labor, tax on undistributed profits, by George E. Holmes, of the New York Bar; pp. 1023. Price, $6.00. Callaghan and Company, Chicago.

When income taxes are mentioned, we naturally think of George E. Holmes, a member of the original Income Tax Committee of this Association which reported in 1915 and a member of our present Committee on Federal Taxation. He originated the remarkably efficient Income Tax Service of the Corporation Trust Company and conducted it from the start in 1913 to 1918,

when he entered private law practice, specializing in tax questions.

The first edition of the book which bears his name, readily established itself as an authoritative, practical interpretation of federal tax law and practice, and the new edition just issued comes as near as anything to being indispensable to the federal taxpayer.

The reviewer speaks personally when he acknowledges his own sense of obligation to the author, evidenced in many ways and particularly in affording him the help and comfort in the midst of the perplexities of private practice, which he obtained from the first edition. Now the second edition, just issued, comes as a sedative at a time when the complexity of federal taxation seems raised to the Nth power.

To be of value to taxpayers making returns this year it was necessary to have the book ready for distribution very soon after the passage of the Act of Congress and the publication of the new Regulations 45 by the Treasury Department, yet the book contains a full discussion even of these very recent regulations. Another unusual feature is the exhaustive treatment of the subject of non-resident aliens and foreign corporations. The chapters on allowable deductions are complete and well arranged, while that on the war-profits and excess-profits taxes contains detailed and careful treatment of these intricate and technical parts of the act. For the lawyer, the chapters on the constitutionality and construction of the law should prove of use.

Mr. Holmes has realized that many provisions of the former law which are no longer in force, will be important for some years to come and has included in his book chapters on such subjects as, for instance, the tax on undistributed net income of corporations. The book also contains chapters on the Stamp Tax and the Capital Stock Tax, as well as a brief but clarifying discussion of the tax on Employment of Child Labor. Throughout the book discussions of puzzling points—and nearly all are puzzling — are presented in simple language and with copious references to authorities and original court and departmental decisions.

In the uncertain and undeveloped state of the law no textbook on this subject can perhaps be wholly satisfactory, either to author or reader, but it is not too much to say that at the present time the book should be invaluable to all who have occasion to consult such a work. It is fully indexed and contains besides an alphabetically arranged table of the leading court decisions covering the period from the date of the Civil War acts down to the very latest decisions rendered during the present term of the United States Supreme Court.—A. E. H.

A large number of exceedingly helpful booklets on the federal Revenue Act of 1918 issued by banks, trust companies, financial houses and others, have been kindly supplied us. As these are all very helpful, containing in most cases explanatory notes, charts and miscellaneous information, we are glad to express our appreciation and list the donors for the benefit of members who may wish to secure them, as follows:

Bankers Trust Company
Corporation Trust Company
Empire Trust Company
Guaranty Trust Company
Halsey Stuart and Company
Harris, Forbes and Company
Irving National Bank
National Bank of Commerce
National City Company
New York Trust Company
—all of New York
First National Bank, Trust and Savings Company, Cleveland
K. K. Kennan, Milwaukee
Lee Higginson and Company, Boston.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

Oberlin, Ohio

[Owing to illness of Professor Lutz, these notes have been furnished by the editor of the BULLETIN]

ALABAMA. Report of the state board of equalization from September 14, 1915, to October 1, 1918. 102 p.

This board recommends inheritance and income taxation and classification of tangible property. It suggests that the "archaic general property tax of Alabama should be dispensed with, and favors Professor Bullock's plan of imposing a tax on all incomes and then taxing all tangible property under a proper classification. There is also a general discussion of franchise and license taxes.

AMERICAN ECONOMIC ASSOCIATION. Report of the committee on war finance. *The American Economic Review*, IX, 1 (March, 1919), Supplement no. 2. 142 p.

This committee consisted of twelve leading economists from all parts of the country, and was divided into five sub-committees to deal individually with the following subjects: income and excess profits taxes; consumption and other indirect taxes; land and capital taxes; public credit; and the fiscal aspects of credit and currency. The report embodies thorough and deep-sighted criticism of existing federal tax laws and presents detailed discussion of proposed ways and means of providing revenue and of promoting sound fiscal policies not only in time of war but in the immediate post-war transition period.

BIDWELL, FREDERICK D. Taxation in New York State. Albany, N. Y. 1918. 301 p.

Contains several chapters giving an interesting history of the origin, reason for and operation of various sources of taxation in New York State. The first chapter treats with colonial taxation and extends from the days of the Dutch colony of New Netherlands to the close of the Revolutionary War. Then follow chapters on internal improvements, public education, early sources of state revenue, state expenditures, exemptions, special assessments, unearned increment, income taxes, etc. These chapters give some general ideas of the various kinds of property which have been the subject of taxation. There are chapters on "Untaxing buildings" and "The fallacy of the single tax."

Mr. Bidwell is statistician of the state tax department and has made a close study of the subject for over twenty years.

CALIFORNIA. Biennial report of the state controller for the sixty-eighth fiscal year, ending June 30, 1918. Sacramento. 1918. 284 p.

Recommends state aid in reconstruction and employment and vocational education of discharged soldiers. Discusses federal encroachments on state taxing powers in corporation, income, and inheritance taxation. The 1919 budget submitted is reduced by two and a half million dollars from the 1917 appropriation.

CHASSELL, E. D. Leakage of national cash. *Farm Mortgage Bankers Association of America.* January, 1919. pp. 3-34.

A criticism of the Federal Farm Loan act. These federal farm loan bonds prove to be a direct and heavy burden on the American people. In the first place, they are tax-exempt, and not only afford the rich investor the opportunity to avoid payment of his just dues to the national and local governments, but compete with the liberty bonds. They do not accomplish the end sought, namely, of producing more food, for 90 per cent are used to pay off existing mortgages. And, furthermore, they do not help the class of people that ought to be helped. Large loans are favored and the wealthier class of farmers are aided, instead of the small farmers. An amendment to this act should be pushed immediately.

COLORADO. Seventh annual report of the Colorado tax commission to the governor, treasurer, and legislature. 1919. 166 p.

Recommends that the income tax be levied in Colorado, as measuring "tax-paying ability," and that this be extended to the salaries of public officials as well as others. Favors lengthening the term of elective officers to not less than four years. Wants power of equalization vested in the tax commission.

COMMISSIONER OF INTERNAL REVENUE. Statistics of income for 1916. Washington. 1918. 391 p.

Contains elaborate tables relating to both corporate and personal income. The latter are analyzed from the standpoint of class distribution, occupation, returns by states and by source, whether from personal service or property.

CONNECTICUT. Tax Commissioner. Information relative to the assessment and collection of taxes. Hartford. 1918. 48 p.

Contains statistics showing "the methods and manner of assessment and collection of taxes and the amount of such taxes levied and collected in the several towns, cities, and boroughs."

CONNECTICUT. Report of the tax com-

missioner for the biennial period 1917 and 1918, including quadrennial statement of property exempted from taxation. 269 p.

Contains an able discussion of Connecticut's new tax legislation; the work of the tax officials, with suggestions and criticism; the administration of the inheritance tax, with graphs, discussion of the question of domicile, conveyances, and court cases; suggestions as to tax limitation; excess of mortgage over assessed valuation; and recommendations in detail for future tax legislation.

ILLINOIS. Constitutional conventions in Illinois. Springfield, Ill.: Legislative Reference Bureau. 1918. 156 p.

A discussion of taxation in Illinois, pages 86 to 96.

INDIANA. Bulletin of the state board of tax commissioners for the year 1918. Indianapolis, 1918. 233 p.

Shows assessment and distribution of values of certain corporations.

LEVINE, LOUIS. The taxation of mines in Montana. New York, Huebsch. 1919. 141 p.

This monograph is a detailed and scientific study of mine taxation in Montana. It explains the system of mine taxation employed in the state and traces its operation in concrete cases; these cases it then examines in the light of general principles of taxation and of methods of mine taxation that have been used or are now in use in other states.

LIBRARY OF CONGRESS. War taxation of incomes, excess profits, and luxuries in certain foreign countries. Legislative Reference Division: Library of Congress. 128 p.

This pamphlet was printed for the use of the House Committee on Ways and Means, and contains a synopsis of the income tax acts of Great Britain, Canada, and France, and similar summaries for the excess profits tax laws of various countries.

MICHIGAN. Report of the board of state tax commissioners and state board of assessors, 1917-1918. 1919. 81 p.

Contains a complete description of the tax system and the powers and duties of the tax commissioners of Michigan. It is recommended that an income tax be levied on entire income from all sources, without classification, the rate to be progressive, and the tax to be collected from the taxpayer only—none collected at source. State, not local, officials to administer the tax.

MICHIGAN. Report of the Michigan budget commission of inquiry. 1918. 280 p.

The commission, appointed by the governor in 1917, presents a full discussion of the advantages of a budget system over the prevailing "invisible government" system. In particular it recommends uniform accounting, supervision of printing, central purchasing agency, and changes in departmental work. A proposed law providing for a budget system is given.

MINNESOTA. Sixth biennial report of the tax commission to the governor and legislature of the state of Minnesota. 1918. 153 p.

One of the recommendations made in this report is that in connection with the taxation of telephone companies. The telephone companies of the state, it is suggested, might be divided into four classes and taxed at graduated rates on gross earnings. It is believed that these graduated rates on gross earnings "will impose an average tax on each class of companies fairly equivalent to what they would pay if the tax were imposed directly on the value of the property."

Other changes recommended are: An amendment to exempt, partially or totally, household goods, agricultural products in the possession of the producer, and tools, implements and machinery; to create the office of county assessor to take the place of the present local assessors in each county; and a law requiring the true consideration to be stated in each real estate conveyance.

MISSOURI. First biennial report. State tax commission budget for years 1919-1920. Fiftieth general assembly. State of Missouri. 1919. 159 p.

In three parts: financial, descriptive, and recommendatory. Parts I and II deal with actual and estimated receipts and expenditures of the various state departments. Part III recommends a more business-like program than has hitherto prevailed in Missouri, and proposes ways of amending the constitution to accomplish these ends.

NEW HAMPSHIRE. Eighth annual report of the New Hampshire state tax commission. Tax year of 1918. Concord. 1918. 199 p.

Contains a digest of the Model Tax System proposed by this Association, and a few of the addresses read at the Conference of the Association of New Hampshire Assessors, December 19, 20, 1917.

RHODE ISLAND. Seventh annual report of the board of tax commissioners made to the governor of the state of Rhode Island. 1919. 53 p.

Recommends requiring a biennial rather than an annual report; repeal or amendment of the tax on bank shares so that the revenue derived from this tax will be larger; uniform date for assessment considered necessary for advantageous administration.

THE BULLETIN

OF THE

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EDITED BY A. E. HOLCOMB

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AT LAST—THE CONFERENCE

After full consideration and in response to the undoubted sentiment of the members, the Executive Committee determined to hold the 12th conference this spring. Upon the reaching of this conclusion, the officers set about to select the place and the exact time, and it appeared that satisfactory local accommodations in St. Louis could not be made by reason of our uncertainty as to the time when immediate decision was necessary. Numerous other conventions were scheduled in that city and the long-drawn-out legislative session (still under way) rendered it impossible for the Missouri officials to give the necessary time and attention to the matter. For these reasons, among others, it was determined to hold the conference in Chicago, in response to earnest solicitations of our Illinois friends. We therefore have communicated with Governor Lowden, who assures us of his cordial interest in the conference and who has issued the usual invitations to the chief executives of the states and provinces.

It is most fortunate that we shall meet under such thoroughly satisfactory arrangements as are thus assured us. Governor Lowden has always appreciated the importance of business-like management of fiscal matters, evidenced by what has been done in Illinois in the way of the reorganization and consolidation of state departments under the efficient direction of Director of Finance Wright. He is at the present time concerning himself with taxation proposals now pending in the legislature. It is certain that much mutual advantage will be derived by the members and delegates from the meeting at Chicago.

Most satisfactory arrangements have been made for hotel accommodations at the Hotel La Salle, La Salle at Madison street. The sessions will be held in the East Room on the Mezzanine floor.

Doubtless members will find it more satisfactory to make their own arrangements for rooms, but Mr. H. W. Paddock, 212 West Washington street, has kindly offered to assist any who may desire it.

The rates at the La Salle run from $2 up without bath and $3 up with bath, for one person. The corresponding rates for

two persons are $3 and $5. Other nearby hotels are:

	without bath	*with bath*
Hotel Sherman, Randolph and Clark Streets—		
one person	$2.00	$2.50
two persons	3.00	4.00
New Morrison, Madison and Clark Streets—		
one person	....	2.00
two persons	....	3.00
Brevoort, 120 West Madison Street—		
one person	2.00	2.50
two persons	3.00	4.00

These, with the Congress Hotel, the Auditorium, and the Blackstone, are the leading downtown hotels.

It is hoped that all members will arrange to reach Chicago Monday night, June 16th, so that registration may be disposed of and an opportunity given for general renewal of acquaintances.

The matter of the appointment of official delegates is something which members can greatly facilitate through communicating with the governor, the state taxing officials or the presidents of colleges and of associations of chartered public accountants. It is assumed that appointments heretofore made will hold good.

Suggestions for discussion on the program will be welcomed by the Secretary.

Let everybody circulate news of this conference and aid in making it a great success. It is to be remembered that the conference is open to all without qualification, whether members of the Association or delegates or not. The fullest possible discussion of the important fiscal problems now confronting the states and the nation is greatly to be desired. The program follows.

PROGRAM OF TWELFTH ANNUAL CONFERENCE

ON

TAXATION

HOTEL LA SALLE

La Salle at Madison Street

CHICAGO, ILLINOIS

June 16-20, 1919

UNDER THE AUSPICES OF

THE NATIONAL TAX ASSOCIATION

Monday Evening, June 16

REGISTRATION OF DELEGATES AND MEMBERS

Registration Office—Mezzanine Floor, La Salle Hotel

Tuesday Morning, June 17, 9:30 o'clock

INFORMAL RECEPTION

Members, delegates, visitors and ladies accompanying them, are invited and urged to meet and get acquainted and renew acquaintances.

FIRST SESSION

Tuesday Morning, June 17, at 10:30 o'clock

1. Organization of the Conference.
2. Addresses of welcome and responses.

ILLINOIS TAX PROBLEMS

3. Discussed by W. T. ABBOTT, Vice-President, Central Trust Company of Illinois; DOUGLAS SUTHERLAND, Secretary Civic Federation of Chicago; and others.

GENERAL DISCUSSION

SECOND SESSION

Tuesday Afternoon, June 17, at 2 o'clock

STATE TAX PROBLEMS, WITH REMEDIES, APPLIED AND SUGGESTED

1. The Taxation of Banks.
   MILTON W. HARRISON, Secretary Savings Bank Section, American Bankers' Association.
2. Recent Tax Legislation in Missouri.
   ISIDOR LOEB, University of Missouri.
3. Indiana.
   JOHN B. PHILLIPS, Indiana University, former State Tax Commissioner of Colorado.
4. Arkansas.
   GEORGE VAUGHAN, State Senator.
5. Montana.
   JOHN EDGERTON, Executive Assistant to State Board of Equalization, formerly Secretary State Tax and License Commission.

THIRD SESSION

Tuesday Evening, June 17, at 8 o'clock

ROUND TABLE DISCUSSION

FOURTH SESSION

Wednesday Morning, June 18, at 10 o'clock

1. Registration Taxes on Intangibles, with special reference to the Connecticut Chose-in-Action Tax.
   FRED R. FAIRCHILD, Yale University, former Secretary National Tax Association.
2. The Tax on Investments in New York.
   JAMES A. WENDELL, Deputy State Comptroller of New York.
3. An Analytical Study of the Workings of the General Property Tax in a Selected County of Missouri.
   W. F. GEPHART, Washington University.
4. The Codification of Tax Laws, with special reference to Iowa, and Suggestions for Uniformity among the States.
   JOHN E. BRINDLEY, Iowa State College.

DISCUSSION

FIFTH SESSION

Wednesday Afternoon, June 18, at 2 o'clock

1. Some Constitutional Aspects of Taxation.
   FREDERICK N. JUDSON.
2. Observations on State Taxation of Railroads under Government Operation and Control.
   JAMES M. GRAY, Brooklyn, N. Y. Author of Gray's *Limitations of Taxing Power and Public Indebtedness*.
3. State Excises on Foreign Corporations.
   THOMAS REED POWELL, Columbia University Law School.
4. Tax and Debt Limitation Laws.
   WILLIAM H. HOYT, Attorney at Law, New York City.

DISCUSSION

SIXTH SESSION

Wednesday Evening, June 18, at 8 o'clock

THE TAXATION OF INCOMES

1. Administrative Aspects of the Federal Income Tax.
   DANIEL C. ROPER, United States Commissioner of Internal Revenue.
2. Sources of Federal Revenue.
   DR. THOMAS S. ADAMS, Chairman Advisory Tax Board, Bureau of Internal Revenue. Former Secretary National Tax Association.
3. Report of Committee on Federal Taxation.
   THOMAS E. LYONS, Member Wisconsin Tax Commission, *Chairman.*
4. State Income Taxation, with Special Reference to the New York Income Tax Law.
   LAURENCE A. TANZER, Counsel to Joint Legislative Committee on Taxation of New York Legislature, 1919.

DISCUSSION

SEVENTH SESSION

Thursday Morning, June 19, at 10 o'clock

Report of the Model Tax System Committee.
CHARLES J. BULLOCK, Harvard University, President National Tax Association, *Chairman.*

DISCUSSION

EIGHTH SESSION

Thursday Afternoon, June 19, at 2 o'clock

1. Report of Committee on Inheritance Taxes.
   JOHN S. CHAMBERS, State Comptroller of California, *Chairman.*
2. The Rhode Island Inheritance Tax.
   J. P. MAHONEY, Mayor of Newport, R. I. Former Member Rhode Island Board of Tax Commissioners.
3. Tendencies and Results of the Extension of Tax-Exempt Securities.
   KINGMAN NOTT ROBINS, Rochester, N. Y.

DISCUSSION

4. The Work and Influence of the National Tax Association.
   LESSING ROSENTHAL, Attorney at Law, Chicago.
5. Business Meeting of the National Tax Association.

NINTH SESSION

Thursday Evening, June 19, at 8 o'clock

ROUND TABLE

TENTH SESSION

Friday Morning, June 20, at 10 o'clock

1. Annual Review of Legislation and Constitutional Changes in Taxation.
   C. C. WILLIAMSON, Chief, Economics Division, New York Public Library.
2. Round Table Discussion.
3. Business Meeting of the Conference.

ADJOURNMENT OF CONFERENCE

LEGISLATIVE NOTES

The thoroughgoing program suggested by the able and energetic special tax and license commission of *Montana* was carried through with astonishing completeness and that state is now started on a business basis in taxation. Secretary Edgerton evinces his interest in our work by telegraphing us of the measures adopted.

A constitutional amendment was adopted for submission, designed to create a permanent tax commission with full powers of supervision and equalization, taking the place of the present state board of equalization.

A law was enacted carrying into effect a constitutional amendment adopted in 1916, requiring the state board of equalization to adjust and equalize the valuations of taxable property in the state as between the several counties, the several classes of property, and individual taxpayers; to review acts of local officers and to do all things necessary to secure a just and equitable valuation of property.

Another law provides for central assessment of inter-county public utilities. Another provides for a classification of property and the taxation of each class at stated percentages of full value, following the Minnesota plan. This law is now before the state supreme court in a test case as to its constitutionality. Another provides for the classification of lands by the local officers under uniform methods established by the state board. The area of the state is ninety-four million acres, which is to be classified into legal subdivisions of forty acres each. The cost, estimated at one and one-half million dollars, is to be met through a special tax levy. The work will require two years to complete.

The board of equalization has organized and selected Mr. Edgerton as assistant in charge of the administration of the above generous program. He wires this as evidence of his present activities. It is certainly to be hoped that he will be with us at Chicago to tell us "how it happened."

Our executive committee member from *Washington*, Mr. Brislawn, advises that the legislature declined to submit to the people the long-hoped-for constitutional amendment to permit classification of property for taxation. It did provide for the appointment of a special commission to study the subject of taxation and report to the next legislature. This commission is composed of two senators and three members of the House of Representatives. T. D. Rockwell, who many members will recall as active and helpful at the early conferences, is one of the senate members. It is to be hoped that the entire commission will attend the Chicago conference.

Commissioner Galloway of *Oregon* writes that the legislature was so busy with the good roads program and with trimming the appropriations to bring the total within the constitutional limitation, that no general changes in the tax laws were seriously considered and, what is particularly gratifying, that no attempt was made to disturb the tax commission or to change the administration of the tax laws—an unusual result. A bill for a personal income tax was introduced but did not get to first base. The bill shows a high degree of care in its drafting and should appear again. Mr. Galloway says that it looked for a time as though a bill would go through exempting all intangibles from taxation, but as finally enacted, the exemption is confined to "all notes secured by recorded mortgages on real property." Provision was made for the elimination, beginning in 1920, of assessments of motor vehicles and for the substitution of annual registration fees, the net amount of the yield to be applied to interest on bonds issued for the construction of good roads. The inheritance tax law was materially revised—upward.

Mr. Bailey of *Utah* reports a revision of the mine tax laws. Metalliferous mines are to be assessed at $5 per acre for the land with an additional value of three times the net annual proceeds and full cash value for machinery and improvements. Non-metalliferous mines are to be assessed at full cash value.

The administrative machinery has been strengthened, the powers of the state board of equalization being extended so as to authorize them to provide rules and regulations to govern local assessing and reviewing officers; to maintain a complete record of all taxable land; to assess all mining property and all inter-county public utilities; to reconvene the county boards of equalization whenever they deem it necessary; to hold district and state conventions with county officials; and to investigate the tax systems of other states and recommend new legislation. The members of the board are to have terms of four years each with salaries of $4,000 and not more than two of the four members may belong to the same political party. This is indeed some progress and Mr. Bailey will be in Chicago to tell us about it.

The chief accomplishment at the special session in *West Virginia* was the enactment of measures to provide for the settlement of the long-drawn-out controversy over the Virginia–West Virginia debt. This controversy has been in the courts for many years, the supreme court having recently rendered its final judgment as to the amount due the state of Virginia, and as a result the legislature has provided for the payment through a bond issue. A transportation tax on oil and gas was passed which, it is said, will more than suffice to pay the interest and provide for the sinking fund. An additional rate of one-fourth of one per cent was added to the corporation income tax to provide for the appropriation for the state police. A general license tax bill, covering hotels, soft drinks, etc., was passed by the legislature, but the action of the governor on this bill is not known.

Secretary Burtless, of the *Michigan* Commission, reports the failure to provide for submission of a constitutional amendment which would permit income taxation, in accordance with the recommendations of the commission. He expresses, however, the belief that sentiment in favor of an income tax is growing and that the next legislature will have to take action.

Every one will be interested to know something of the unusual and widely advertised doings of the *North Dakota* legislature. We give the following account as received from Mr. Packard, formerly a member of the tax commission, now assistant attorney general:

RECENT LEGISLATION IN NORTH DAKOTA

The sixteenth legislative assembly of North Dakota, which concluded its labors with the closing days of February, will be memorable in the history of the state. They went far afield in economic legislation and, among other things, revolutionized the tax and revenue Code.

Perhaps the most surprising tax measure of all was the classification of property Act. It divided all property into two classes, assessed at 100% and 50%, respectively, of actual value. Class one includes all railroads and other public utilities, bank stock, land, exclusive of structures and improvements, flour mills, elevators, warehouses and store-houses, buildings, and improvements upon railroad rights-of-way, and structures and improvements upon town and city lots used for business purposes. Class two includes all live stock, agricultural implements, engines, threshing machines, structures and improvements used for homes upon town or city lots, and all other property not specifically mentioned in either class.

This is accompanied by an exemption Act which exempts all buildings and improvements upon farm lands; $1000 upon all structures and improvements upon city lots occupied by the owners as homes; $300 upon household goods and equipment; $300 upon clothing, diamonds, jewelry, books, firearms and bicycles of each individual; $300 upon the tools of working men or mechanics; $1000 upon farming tools and implements and equipment of farms.

An income law was passed, dividing all incomes into earned and unearned. On earned incomes, a rate of one-fourth of one per cent upon the first thousand or fraction thereof is provided, progressing by the addition of one-fourth of one per cent on each thousand until $20,000 is reached; on the next $10,000 the rate is 6 per cent, from $30,000 to $40,000 it is 8 per cent; on all incomes in excess of $40,000 it is 10 per cent.

Unearned incomes are subject to a tax of one-half of one per cent upon the first thousand dollars or fraction thereof, and the rate progresses by one-half of one per

cent until $10,000 is reached. All incomes between $10,000 and $20,000 bear a tax of 6 per cent; between $20,000 and $30,000, 8 per cent, and in excess of $30,000, 10 per cent. The measure provides for collection at the source and for payment of the income tax with personal property tax receipts. It exempts life insurance companies and all income from mortgages upon North Dakota land. It becomes operative in 1920.

A corporate excise tax was enacted of 50 cents a thousand upon each $1000 of bonds and stocks issued by domestic companies and upon the state's proportionate share of foreign companies, with an exemption of $10,000 upon both classes.

A percentage sales tax was provided upon all sales of oils. This provides for a one-fourth of a cent per gallon tax upon the highest grades of gasoline and one cent upon the inferior grades, and three-tenths of one cent on ordinary lubricating oil.

An act abolishing the three-man Tax Commission also passed. The Legislature repealed the 1911 law and substituted for the three-man commission a commissioner who is subordinate to the State Board of Equalization. This board is composed of the Governor, the Auditor, the Attorney General, the Treasurer, and the Commissioner of Agriculture and Labor. Upon this body was conferred all the powers of the old Tax Commission and the new tax commissioner was made secretary to this body. His acts are reviewable by it. He is removable at their pleasure and may not hire a clerk without their ratification, nor can he pay a bill without the approval of the board, in addition to the approval of the regular auditing board.

Another act provided for County Supervisors of Assessors. These supervisors are to have the same salary as the county clerk of court and are allowed $300 for traveling expenses per annum. They are nominated by the tax commissioner and must be ratified by the Board of County Commissioners. The old elective township assessors were untouched, as well as the township Boards of Review and county Boards of Equalization. The duties of the county auditor are also left untouched.

Of these measures, only the one-man Tax Commission law is being referred. More than 30,000 signatures have been secured to these petitions, with some fifty days yet remaining in which to circulate petitions. Petitions bearing 30,000 signatures compel the Governor to call a special election within 130 days after the adjournment of the Legislature.

A near revenue measure is the compulsory hail insurance act. This provides for a tax of three cents an acre upon all the tillable land in the state to maintain the hail insurance department. The local assessor classifies the land and before he turns his books over in June any landowner may, by filing a statement with him, be exempt from the operation of the insurance features of the law, but he must pay the three cents per acre upon his tillable land. If he serves no notice upon the assessor, his crop is insured and he may be assessed thereon not to exceed 50 cents per acre to cover hail losses to crop.

Several important measures bearing indirectly upon taxation were the so-called Non-partisan League economic measures. They contained provisions for establishing a state bank, state-owned terminal elevators, flour mills, packing plants, public warehouses, and for purchasing homes or farms under a sort of glorified building-and-loan scheme. Seventeen million dollars in bonds were authorized—two million dollars for the bank, five million dollars for the industries and ten million dollars to be loaned upon real estate mortgages. All of these enterprises are to be under the control of a board known as the Industrial Commission, composed of the governor, the attorney general, and the commissioner of agriculture and labor. The governor may exercise the veto power over the other two members of the commission. This board, without their expenditures being audited in the regular manner, may expend the seventeen million dollars provided in these acts, and large sums otherwise provided, and may purchase or secure by condemnation or build the various buildings and plants necessary, without calling for bids or securing estimates. The bank is a bank of general deposit, but loans only upon real estate mortgages or bills of exchange. All deposits in the state bank, but not in other banks, are tax free and are guaranteed directly by the state. The Industrial Act permits the commission to engage in any business connected with the products of the farm. This commission also fixes the buy-

ing and selling price of all commodities to be handled by these various industries.

The Home Building and Loan Association may exercise the power of eminent domain and will secure and sell to any applicant a home or farm home equipped with buildings upon the payment of one-fifth of the purchase price down and a minimum payment of $25 per month.

These industrial measures will all be referred at a special election, the necessary signatures having already been obtained to petitions ordering it.

Director Asplund of the *New Mexico* Taxpayers Association writes that perhaps the most important new legislation in that state is that changing the state tax commission and enlarging its powers. Instead of a commission of five, appointed every two years and sitting ninety days each year, the commission provided for under the new law consists of three members, one appointed every two years for a period of six years. Of these, one is called the chief commissioner, who is on duty continuously, and the other two are called associate commissioners, who will be on duty not to exceed 120 days each year. The chief commissioner gets an annual salary of $3,600, and the other two $10 each per day when acting in the performance of their duties. The present chief commissioner is appointed for the six-year term. They have, therefore, practically a permanent commission. The power of the commission to equalize by per cent increases or decreases upon classes of property within each county was questioned, but the issue was never decided in the courts. Under the old law the commission's power of review of the assessments made by the local officials was limited to finding omitted property and to equalizing through a percentage increase or decrease of the total valuation of classes of property in the various counties. It was almost impossible for the state to appeal from the county boards of equalization to the state board. Under the new law, however, the state tax commission is given power to fix the valuation of land throughout the state and to revise the valuation of any property whatever. Provision is made so that appeals may be taken from the action of the county boards of equalization by any agent of the commission. For the carrying out of its duties the commission is allowed an annual appropriation of $40,000.

Among revenue measures passed by the legislature are included a corporation franchise tax, an inheritance tax, and an income tax. These are all new forms of taxation for New Mexico.

A delinquent tax collection law was passed which is expected to cure many of the defects in the present laws. The state tax commission is given power to make this law effective.

Mr. Asplund adds that a meeting of the Tax Association in June would suit New Mexico better than any other time, so that we may anticipate a full representation at Chicago from that state.

Referring to our note in the April BULLETIN, we are glad to say that *New Hampshire* is "safe", and that Judge Fellows and his associates remain unharmed. Not only that, but the legislature passed an act entitled "An act to prevent the overthrow of government by force."

Besides this, the poll tax was increased from $2 to $3 to offset an exemption from taxation of "pure bred sires" in an act for the "protection of better live stock." Local license fees are provided for motor vehicles which are removed from taxation as personal property. These local fees are in addition to the state license fees and must be paid before the state license can be issued. A budget law was enacted requiring the governor-elect to do what appears to be a natural thing, i. e. to submit estimates of the state departments to the legislature. Revenue needs led to the passage of a direct, graduated and progressive inheritance tax law. A committee of prominent citizens, including the president of Dartmouth College, submitted a notable report, with a bill which became a law, under which New Hampshire will undertake to provide a thorough system of schooling, under well-qualified teachers, including evening courses for persons who cannot read or speak the English language understandingly, with the requirement for the exclusive use of English for elementary instruction in both public and private schools.

The legislature, evidently influenced by the fact that most of the street railways are insolvent, passed an exemption act for any such railway which can show to the Public

Service Commission that it is "incapable, under proper management, of earning sufficient money to pay its operating expenses and taxes and to provide for the necessary repairs and maintenance of its properties and adequate reserves for depreciation thereof."

Commissioner Maxwell of *North Carolina* writes that the legislature adopted a revaluation act designed to secure a complete and exhaustive revaluation of all the property in the state, as a means of providing an accurate and rational basis for the determination of future steps in tax reformation. A cursory examination of the act indicates that it is well designed to accomplish the purposes expressed in its title to "provide for the listing and valuing of all property, real, personal and mixed, at its real value in money." The provisions for state control and supervision are thoroughgoing.

The trials and tribulations of a state tax commission "in the making", as heretofore exemplified by the experiences in West Virginia, Ohio, Colorado, Mississippi, New York, Florida (the latest "victim"), are well illustrated by the experience in *Missouri*. Since our last issue, little actual legislation has been enacted as we go to press. The House has passed two bills repealing the commission and the Senate one. Owing to divergent political control the bills of one branch are not acceptable to the other, with the result of something of a "deadlock." One thing seems certain, neither house relishes the policy of the tax commission of vigorous enforcement of full valuation and yet neither cares to enact a bill repealing the laws which require it, such bills having been killed. The legislature is scheduled to adjourn about May 10th, so that some result will have been reached before this issue is in print. The discussions at Chicago of our Missouri friends will naturally take on added interest because of these events.

The soft drinks tax and the rate of the corporation franchise tax have been increased. Amendments to the income tax law are pending, lowering the exemptions and increasing the rates. Owing to lack of administrative machinery and the offset allowed for property taxes, the yield of this tax has been comparatively slight. A mortgage recording tax bill is pending, with slight prospect at this writing of passage.

The newspapers record the possibility that Chairman Roach, if pressed too far, will "open up" and run for Governor upon the issue of tax reform which he has so courageously and relentlessly defended.

A summary of the tentative proposals of the *Georgia* special legislative committee, which they are now discussing throughout the state, shows that they have in mind a constitutional amendment to permit classification and segregation; eliminate the necessity of ad-valorem assessment of all property and to authorize taxes on incomes, inheritances and privileges. They also recommend a tax commission of three members, the comptroller general to be a member and ex-officio chairman, the others to be appointed for terms of six years. The commission is to have large powers over the local administration of the tax laws. A novel and very important suggestion is for the appointment by the Tax Commission, by civil service rules, of deputy state tax commissioners, one for each congressional district. These deputies would act, under direction of the commission, in the matter of local assessments, have jurisdiction in connection with the administration of the inheritance tax and act as adjusters of differences between individual taxpayers and county boards of review, with appeal to the tax commission. The taxpayer would list all his property except real estate. All papers transferring real estate would show the actual price paid and the name of the person whose interest is protected.

The Commission also suggests the taxation of bank deposits for state purposes at a low rate, payable by the bank with recourse against the depositor; the exemption of household goods up to $250 and a low rate tax on amounts in excess of the exemption; the taxation of corporations upon the income basis with extension to individuals as soon as Congress shall permit the states to inspect individual returns; a direct and collateral inheritance tax; a state license tax for merchants on the basis of purchases, less indebtedness incurred in such purchases, at graduated rates, along the lines of the Virginia law (L. 1918, p. 75). They also propose a registration tax

on secured debts at a low rate for each year of the life of the debt, the yield to be equally divided between the state and county with provision for additional levy by municipalities. Another feature is the recommendation of a permanent budget committee, whose budget proposals should not be changed except by a two-thirds vote of the members of each house and that this shall mean a majority of each house.

Certainly there is much of interest and help in these proposals which will come in some form before the legislature that meets in June.

Professor Lutz sends us the following notes on the *Ohio* situation: The legislature recessed on April 18 until May 5. Its financial problems, which are numerous and pressing, were hardly touched at the time of the recess, although a fairly comprehensive survey of the situation has been made by the Joint Special Committee on Taxation. A summary of the program of this committee will indicate the extent to which the legislative task remains unfinished.

The principal achievement thus far has been the enactment of an emergency revenue bill for the relief of cities and other local units. The financial distress of all local districts has been greatly increased by the requirements of sinking fund and interest payments, combined with a strict tax rate limitation. The relief measure authorized counties, municipal corporations, school districts and townships, with the approval of the electorate, to fund floating indebtedness by bond issues having a maturity not to exceed five years. The tax rates necessary to meet interest and sinking fund charges upon such issues are not to be subject to any limitations. Current rumor has it that the governor objects seriously to this bill and that he intends to veto it, offering a substitute measure which will provide for an income tax. The Joint Tax Committee admits all of the criticisms against the bill, but advocates it nevertheless purely as an emergency measure until a permanent tax program can be worked out. It is devoting itself to this task during the recess.

Remaining features of the program, so far as they have passed beyond the purely tentative stage, are the following:

A direct inheritance tax measure which is ready for submission. This bill does not conform to the standards suggested in the model law framed by the National Tax Association, but the revenue considerations were frankly admitted to be paramount.

Re-submission of a classification amendment at the November election.

In the event that classification is adopted, the committee proposes various other changes. What is really necessary is a thorough overhauling of the tax system, if the effort to eliminate the uniform rule is finally successful. Whether this step will be decided upon remains to be seen. In any case various tax measures are being considered, among which may be mentioned an income tax and a graduated automobile tax.

Taxation and financial problems in Ohio were considered at one session of the second annual meeting of the Ohio Academy of Social Sciences, held at Columbus on April 18-19, 1919. Mr. H. G. Williams, editor of *The Ohio Teacher*, presented a paper on "Taxation Changes Needed in Educational Administration," and Professor Clarence Laylin, general counsel for the Joint Tax Committee, discussed the taxation problems before the Joint Committee on Taxation of the General Assembly.

Professor Miller writes that more than seventy tax bills and joint resolutions for amending the tax provisions of the state constitution were introduced during the recent session of the *Texas* legislature. One of the measures enacted levies a tax of one and one-half per cent on oil production. Recent rich strikes of oil in Texas prompted this measure, and estimates of receipts from it vary from one million to two million dollars annually, which is expected to meet the need by the state government for more revenue. Proposed similar taxes on coal, sulphur, salt and quicksilver production, received unfavorable committee reports and got no farther.

The rates of the franchise tax on foreign corporations were amended, the purpose being to equalize, for the benefit of domestic corporations, this tax as it affects the larger corporations. The 1917 amendment omitted to include a minimum franchise tax on foreign corporations, and this defect the 1919 amendment corrects by restoring the former minimum of $25. The franchise tax on domestic corporations was changed so as to make the basis of calculation the proportion of the capital stock,

surplus and undivided profits that the gross receipts in Texas is to the corporation's entire gross receipts. The only difference in the rates now applying to the two classes of corporations is that the rate for the first $100,000 of the basis is fifty cents for the foreign corporation and twenty-five cents for the domestic.

The Texas collateral inheritance tax has never been successfully administered. In 1917 the comptroller of the state was empowered to contract with persons for the collection of the tax. The method of collection has again been changed. The success of the latest proposed method depends on the activities of the county judges and the county and district attorneys. These officers are allowed fat fees, and these constitute apparently the only spurs to the performance of their official duties which the bill contains.

Unlike many other states, Texas does not exempt its public securities from taxation. A bill to provide for their exemption was favorably reported by a senate committee, but this was the only consideration it received. In the joint resolution proposing an amendment to the constitution for the purpose of authorizing state aid to those citizens who are desirous of acquiring or improving their homes, it is provided that the securities issued to carry out this purpose shall not be subject to taxation.

Other joint resolutions passed proposing amendments to the constitution provide for increasing the maximum tax rates for cities, towns, special school districts and for roads, streets, bridges, public buildings and other similar properties.

A bill which passed the Senate but which in the House was recommitted and was killed in committee, sought to have an investigation of the tax system of the state made by a joint legislative committee. The sentiment in the House seemed to be that as there were no tax experts in either House or Senate, the undertaking would be a fruitless one. Senator Woods was the author of this bill. He has since the organization of the National Tax Association been a reader of its reports and an admirer of its aims. He was also the author of a joint resolution proposing an amendment to the constitution which would permit classification of property and separation of state and local revenues. This resolution received a favorable report by the committee to which it was referred, but it got no farther.

Two tax measures were introduced in the House which attracted a good deal of attention, because they represent new elements and new tendencies — new, at least, for Texas — in the membership of the House. One was an amendment to the constitution, written by two single-taxers in the House, which proposed that improvements on land and personal property should not be subject to taxation. This received an unfavorable committee report. The other measure was a proposed constitutional amendment which, among other things, provided for a graduated land tax. It was favorably reported and developed considerable strength in the House, but it finally failed to pass. A bill was passed which provides for a Board of Control with very great powers, among which is that of framing a state budget.

There will be a special session of the legislature probably early in the summer for the primary purpose of the enactment of the general appropriation bill. The governor has recently stated that the revenues of the state are adequate and that the need now is to correct the injustices in the existing system of taxation. In the light of this expression by the governor and in view of the interest shown by the members of the legislature and by the press in tax reform, it is confidently expected that at the forthcoming special session considerable attention will be given to the overhauling of the antiquated decentralized general property tax now in effect.

There is no loss without some gain. Prohibition was the direct cause of the enactment by the *New York* legislature of a full-fledged, up-to-date, double-barrelled and loaded personal income tax law, drawn on the lines of the federal law and in most respects comporting with the recommendations of our Model Tax Committee.

The hearing mentioned in the April issue was had, lasting two days, at which the Editor was an interested spectator.

The bill as introduced was difficult of successful attack at any vital point, and though there was much talk, little change was made except such as was induced by political considerations. It passed through five prints. One of the early ones has been distributed somewhat widely by the Editor.

In brief, the law provides for a tax on the net income of individuals from all sources at rates of 1% on incomes up to $10,000, 2% up to $50,000, and 3% over the latter sum. The computation of income follows almost exactly the methods adopted in the federal law, the differences being in the interest deduction where the limitation follows the Massachusetts method and in the matter of deduction for taxes, no deduction for any income tax being allowed.

A departure from the recommendations of the Model Committee is in providing for the taxation of non-residents. This feature, however, arises doubtless from the peculiar geographical location of New York City which draws so largely from the neighboring states of New Jersey and Connecticut for its business population. The tax, however, as to non-residents is applied only to income derived from business income and does not extend to income from investments. Collection at source at 2% applies to salaries paid to non-residents, otherwise the collection of the tax is provided through personal return and provisions for information at source.

A regrettable amendment, made late in the session, provides for full exemption for income from state and municipal securities under the curious notion prevailing that the taxation of these securities will cause loss to the municipalities, whereas it would appear that a vastly greater loss arises through the exemption.

The law is expected to produce something like $45,000,000 in revenue, the yield of which is to be prorated between the state and the localities on a 50% basis. In spite of this enormous revenue, which otherwise would have been obtained largely through a tax on real estate, the chief critics of the law at the hearing were representatives of organizations styled "real estate" associations. It should be said, however, that there were a large number of other real estate associations which gladly supported the law and advocated its passage without regard to the size of the yield. Another amusing result is that among the most vehement critics at the hearing was the state comptroller. In the closing hours of the session the administration of this law was transferred from the Tax Commission to the state comptroller. He, therefore, thus receives punishment for his criticism.

Whatever may be said as to this particular law, it is certain that through it income taxation will be put on trial under the most difficult conditions that can exist. New York has never known the meaning of definite and effective tax laws. Evasion has been the rule. Indirect taxes have thrown the burdens in many directions. To now successfully administer a drastic personal income tax in the greatest city in the country, will require all the energy and endurance of which the administrative officer is capable. Whether the law will prove permanently successful or not, it is certain that New York will never return to the conditions heretofore existing. Intangible personal property is made exempt from taxation which should reconcile wealth to the tax.

Other measures adopted by the legislature were increasing the business tax on the net income of corporations from 3% to 4½% and its extension to all business corporations instead of being limited to manufacturing and mercantile companies. The motor vehicle license tax was increased by a law applicable to New York City. The inheritance tax law was amended so as to render liable to tax certain forms of intangible property of non-resident decedents. Provision was made for the use of tax maps in local assessment work and for the employment by local assessors of experts to aid in the valuation of property. A law was passed providing a method whereby the franchise tax upon certain corporations engaged in interstate business may be ascertained. Another bill enacted, but which was vetoed by the governor, is that for the exemption of vessels engaged in foreign commerce for another period of twenty years from 1922, when the present exemption expires.

The income tax law will most certainly be approved, as well as the increase in the corporation business tax, and there is little likelihood of a veto of any of the other bills.

From Secretary Ives of the *Minnesota* commission we learn that there was but one outstanding feature of the late legislative session as far as tax matters are con-

vened, and that was the decision to submit to the people at the 1920 election an amendment to the state constitution authorizing the legislature to enact a graduated and progressive income tax law, with the additional provision for the exemption of a reasonable amount of income from taxation. It is also provided that "such taxes may be in lieu of taxes on any class or classes of personal property as the legislature may determine."

In addition, this amendment wipes out the present constitutional provision allowing the legislature to exempt from taxation "personal property not exceeding $200 in value for each household, individual, or head of a family, as the legislature may determine," but gives the legislature the power to exempt household goods, agricultural products in the possession of the producers thereof, and tools, implements, and machinery "to such an extent and in such a manner as the legislature may determine."

There was little opposition to the submission of this amendment. To become effective it must be approved by a majority of all the votes cast at the 1920 election.

Other bills were passed at follows:

Increasing inheritance tax rates, but relieving all bequests made to or for the use of the "State of Minnesota or any political division thereof for public purposes exclusively, and any devise, bequest, gift, or transfer to or for the use of any corporation or association organized and operated for religious, charitable, scientific, literary or educational purposes exclusively," etc., from any tax whatsoever. Heretofore, bequests to such institutions or organizations outside the state have not been exempt and a considerable income has been derived from this source. While the new rates will bring in a larger revenue, this will be more than offset, in the opinion of the attorney general's department, which administers the law, through the loss occasioned by the new exemption clause.

The so-called bushel tax on grain was doubled, the new rates being ½ mill for each bushel of wheat or flax handled by an elevator during the year and ¼ mill upon each bushel of all other grain. The tax commission recommended that the tax be one mill and ½ mill, as above, or that the law be repealed.

Assessors will receive $4 a day instead of $3 as heretofore.

The expenses of county auditors called to the capitol to confer with the tax commission must be paid by the counties.

Certain abatements of penalties for unpaid taxes of soldiers and sailors provided for.

Many important tax bills were killed, among them one proposing a 10 per cent tax on the net value of iron ore at the mouth of the mine—the so-called tonnage tax; a bill imposing a flat rate income tax of 5 per cent on royalties derived by the fee owner of mining properties; a bill recommended by the tax commission, classifying telephone companies for the purposes of taxation and imposing different rates of taxes on the gross earnings of the companies in the different classes. Several other minor tax commission bills were defeated. One of these required administrators of estates to settle for all current taxes before being discharged, and another was intended to put teeth into the money and credits tax law.

Bills providing for the distribution of the railroad gross earnings tax among the districts through which the lines run were proposed in both houses but never got out of the committees. At present the entire tax goes to the state and is used for state purposes only.

EXCHANGE LIST FOR DISTRIBUTION OF PUBLIC DOCUMENTS

The exchange of official reports, regular and special, between the tax officers of the various states has doubtless been one of the very best means of securing that wide discussion of fiscal problems which is so helpful. Many of these reports are kindly sent to the Secretary of this Association, where they are highly prized and serve to keep him in touch with the general current of opinion. With the thought of securing a correct and complete list of the officials and departments, a tentative list has been

prepared and a copy sent to each name thereon. This list is reproduced below. It is our desire to correct any errors which may be found in that list and to add such officers as have been omitted. After such correction it will be reprinted, and may thus be used as an exchange list. A further suggestion may be made in this connection. There are not a few organizations of one kind or another, which issue bulletins more or less regularly, dealing somewhat extensively with fiscal problems of importance and interest. It is thought that our list may be used by such organizations and that thus the information, statistics, articles, and other material published by these organizations may be put to the best and widest use. It would facilitate our purpose if such organizations as we refer to, would make use of our list in distributing these bulletins or pamphlets.

The same suggestion may also be made as to individuals publishing articles or addresses of interest to the commissions and to our members generally.

We would be pleased to be advised of any organization, bureau, or individual willing to co-operate in perfecting this exchange or reference list by suggesting names to be added or otherwise. Our tentative list is as follows, the address being, unless otherwise specified, the capital of the state:

State	*Official*
Alabama	State Board of Equalization
Arizona	State Tax Commission
Arkansas	State Tax Commission
California	State Board of Equalization
Colorado	State Tax Commission
Connecticut	State Tax Commissioner
Delaware	State Treasurer
District of Columbia	Commissioners of the District
Florida	State Comptroller
Georgia	Comptroller General State Tax Commissioner
Idaho	State Board of Equalization
Illinois	Department of Finance State Board of Equalization
Indiana	State Board of Tax Commissioners
Iowa	Secretary of Executive Council
Kansas	State Tax Commission
Kentucky	State Tax Commission
Louisiana	Board of State Affairs
Maine	Board of State Assessors
Maryland	State Tax Commission (Address, Baltimore)
Massachusetts	State Tax Commissioner
Michigan	Board of State Assessors
Minnesota	State Tax Commission
Mississippi	State Tax Commission
Missouri	State Tax Commission
Montana	State Treasurer Board of Equalization
Nebraska	State Board of Equalization
Nevada	State Tax Commission
New Hampshire	State Tax Commission
New Jersey	State Department of Taxes and Assessment
New Mexico	State Tax Commission
New York	State Tax Commission
North Carolina	State Tax Commission
North Dakota	State Board of Equalization
Ohio	State Tax Commission
Oklahoma	State Auditor
Oregon	State Tax Commission
Pennsylvania	Attorney General
Rhode Island	State Board of Tax Commissioners
South Carolina	State Tax Commission
South Dakota	State Tax Commission
Tennessee	State Board of Equalization
Texas	State Comptroller State Tax Commissioner
Utah	State Board of Equalization
Vermont	State Tax Commissioner
Virginia	State Tax Board Auditor of Public Accounts
Washington	State Tax Commissioner
West Virginia	State Tax Commissioner
Wisconsin	State Tax Commission
Wyoming	State Tax Commissioner State Board of Equalization
United States	Commissioner of Internal Revenue

Outlying Territories

Alaska	Territorial Treasurer
Hawaii	Territorial Treasurer
Philippine Is.	Secretary of Finance
Porto Rico	Treasurer

Canada

Dominion	Commissioner of Taxation
Alberta	Minister of Public Works
British Columbia	Minister of Finance
Manitoba	Provincial Treasurer
New Brunswick	Provincial Treasurer
Nova Scotia	Commissioner of Works and Mines
Ontario	Provincial Treasurer
Quebec	Comptroller of Provincial Revenue
Saskatchewan	Minister of Municipal Affairs

Newfoundland	Minister of Finance and Customs

Mexico

Secretary of Finance

We have also suggested that reports, documents, addresses, and other material be sent to Professor H. L. Lutz, Oberlin, Ohio, for review or mention in the BULLETIN, and to A. E. Holcomb, Secretary of the *National Tax Association*, 195 Broadway, New York City, for general use in connection with the work of the Association.

UNIFORM BASIS FOR STATE AND FEDERAL TAXES ON INCOMES

WALTER N. SELIGSBERG

A number of states—notably New York, Massachusetts and Connecticut — have passed income tax laws, levying an income tax based upon the amount of net income upon which the taxpayer is assessed for income by the Federal Government. Of course these acts themselves fix the rate of the tax for state purposes and simply adopt as a basis for the tax the measure of net income established from time to time by Congress in its income tax legislation. An attack appears to have been made upon this method of assessing state income taxes, on the ground that by adopting the basis established by a different legislature, the state legislature abdicates its functions—that the resulting enactments are not really acts of the state legislature and are therefore unconstitutional.

The whole question was discussed in a very able opinion by Judge Finch of the New York Court of Appeals, over twenty-five years ago, in the case of *People* v. *Fire Association of Philadelphia* (92 N. Y. 311). In that case the New York Court of Appeals established the criteria which determine whether a particular act amounts to an abdication of legislative power. The act there under consideration was one fixing the license fees to be charged foreign insurance companies for permission to do business in the state of New York, and the particular provision attacked was the provision adding retaliatory amounts to the normal license fees where larger fees were charged for similar privileges to New York companies seeking to do business in other jurisdictions. For instance, the Pennsylvania fees for New York companies seeking to do business in Pennsylvania were larger than the normal fees established by the New York statute, and by the retaliatory feature the amounts charged in Pennsylvania from time to time remained the amounts to be charged against Pennsylvania companies seeking to do business in New York. The criticism that by this retaliatory feature of the statute the New York legislature abdicated its functions, was answered by the Court's opinion, as follows:

> "The argument is, that the nature of the attempted legislation is vicious; that what the amount of a tax, fine, penalty or license shall be is essentially the direct and immediate effect of statutory enactment; that the act in question does not determine it; that it remits it to the legislature of another state by its enactments to create or change the tax. . . . But the whole argument rests on the single point that the amount of the tax or fine imposed is not definitely fixed by the terms of the statute, but depends upon a certain rate upon foreign legislation. Is it true that a fine or tax cannot be imposed unless its amount be stated in the law? And that, if left to be determined by some other tribunal, thereby the legislative power has been delegated? Laws define a multitude of forbidden acts and impose fines and penalties not exceeding certain amounts, but below those amounts, left wholly uncertain and committed to the discretion and judgment of judicial officers or tribunals. It is quite certain, therefore, that the legislature does not abdicate its functions and delegate its authority when it imposes a fine or penalty without itself fixing the amount, or when it leaves it to be fixed by some other tribunal. But in the statute before us nothing is left to anybody's discretion. That is certain which can be rendered certain, and the act fixes the tax by reference to an extrinsic fact which determines its amount in excess of a fixed and established rate. Because that extrinsic fact is the legislation of another state, it does not follow that the legislative discretion of such other state is in any manner substituted for our own."

It seems clear, therefore, that since the rate of tax is made certain by all of this legislation and the basis or measure of net income is for each year determinable by reference to the current congressional legislation, that the adoption of such a basis for income taxes will not be held to be abdication of its function by the state legislature nor will the acts be held to be invalid because of indefiniteness. In Judge Finch's opinion, for purposes of illustration, the Judge gives an example of the kind of law which the Court would hold invalid because it would involve the abdication of power by the state legislature, and it is, perhaps, reference to this illustration that has given rise to the thought

fully attacked.

Judge Finch considers invalid a law enacting that the rate of interest in New York for the loan of money should be such and the same as that which should from time to time be prescribed by the law of any other state, for example, Maine, and states as the reason for such invalidity that such a law would be a pure case of abdication of its function by the legislature because there would be no dependent or causative connection between the domestic and the foreign law. The only discussion on the merits could be in Maine, and Judge Finch goes on to say after stating the suppositious interest case:

"There is thus developed the clear and wide difference between the two laws. One has merits of its own; the other has none. The one is enacted *because* of the foreign law; the other only *according* to the foreign law. The one is passed for legislative reasons and out of a legislative discretion which the foreign law and its possible mutations engender; the other without any such reasons and with no reason whatever, but only through trust in a foreign reason. It seems to us that the difference is plain and decisive."

It is, however, clear that the objection to the supposed interest law, viz., that it involved the yielding to other agencies of the legislative discretion of the state, cannot be made applicable to the income tax legislation. Surely the adoption of uniform bases for state and federal taxation is in itself a desirable result for all taxpayers. The convenience, the simplification of accounting, and the consequent stability of business are, in themselves, ample reasons for adopting the federal measure of income and for changing the state measure from time to time with the changes in the federal law.

We thus find that the two objections urged in the Fire Association case, which seem to be the only objections which can be urged against the validity of the tax laws, are comprehensively dealt with in the decision of the Court of Appeals, and it seems that the reasoning there set forth applies fully to these cases. It is true that there were two earlier cases in Alabama and in Indiana which held to the contrary, but they are satisfactorily dealt with in the opinion of the Court of Appeals. This opinion has stood for so long without question, and its reasoning is so clear and convincing, that it seems safe to assume that the courts in other jurisdictions will follow this decision, and that the adoption of the uniform basis for income taxation will be sustained.

CONSTITUTIONAL LIMITATIONS OF TAX LEGISLATION

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An address read at the meeting of the Minnesota Tax Association, January 16, 1919

Taxes are burdens and charges imposed upon persons or property to raise money for public purposes. The power to tax rests upon necessity and is inherent in any sovereignty. Such power is restricted only by constitutional grant or limitation.

The government of the United States is one of *enumerated* powers, the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitution of the several states, which are not grants of power to the states, but which apportion and impose restrictions upon the powers which the states inherently possess.

Our supreme court has held that the provisions of our state constitution do not confer any powers upon the legislature, but are mere limitations; and the legislature has all the powers of an absolute sovereign, of which it has not been deprived by the constitution. It therefore follows that in Minnesota the legislature may tax property, persons, possessions, incomes, privileges and occupations, subject only to the existing constitutional limitations.

What are these limitations? Prior to 1906, our constitution provided that "all taxes to be raised in this state shall be as

nearly as may be equal and uniform throughout the state." At present the constitution provides as follows:

"The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200.00, for each household, individual or head of a family, as the legislature may determine: Provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation, and provided further, that nothing herein contained shall be construed to affect, modify or repeal any existing law providing for the taxation of the gross earnings of railroads."

It is to be noted that under the constitutional provision just read:

(a) The power of taxation cannot be surrendered or suspended.

(b) Taxes must be uniform upon the same class of subjects.

(c) Certain properties are specifically exempted from taxation.

(d) The legislature is authorized to exempt from taxation, personal property not exceeding $200.00 in value for each household, individual or head of a family.

It must be kept in mind that the provisions as to exemption from taxation of the mentioned educational, religious and charitable institutions are self-executing and mandatory.

As to exemption, the only leeway possessed by the legislature is as to the amount of personal property not exceeding $200.00 in value which, for each individual or head of a family, may be relieved from taxation.

As to the classification of subjects upon which the taxes must be uniform, primarily the legislature must create or define classes. The legislative determination is binding upon the courts, unless it can be pointed out that the classification adopted is purely fanciful or arbitrary, and that no substantial or logical basis exists therefor.

In my opinion, our legislature could not legally provide that all property within a properly prescribed class should be assessed at a *merely nominal value*, as compared with other assessment values, for by so doing the power of taxation as to such property would in effect be surrendered or suspended, and an exemption, for practical purposes, would be granted contrary to the constitutional limitations.

Courts generally have held that a constitutional enumeration of exemptions, such as we have in Minnesota, precludes the granting of any other exemptions. The result, then, is that the legislature in this state has nothing to do with tax exemption except in one instance, to wit: It may exempt personal property not exceeding $200.00 in value for each household, individual or head of a family. The legislature must provide for the taxation of property not exempt. It may classify such property on a logical basis. But suppose it should provide by classification for the assessment of the land alone; what would be the result? I predict that the tax levy would be held invalid as violative of the constitutional provision, which provides that no person shall be deprived of his property without due process of law. Such due process of law provision is found in both the state and federal constitutions.

The Supreme Court of the United States, in considering the 14th amendment to the Federal Constitution, has made numerous decisions affecting state taxation. Among such we find holdings to the following effect:

"The general rule is that, in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference."

"It was never contemplated, when the amendment was adopted, to restrain or cripple the taxing power of the state, whatever the methods they devised for the purpose of taxation, unless those methods by their necessary operations were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect to the rights of property."

"The enforcement of a tax levied under a void law is a deprivation of property without due process of law."

"A taxing act which exceeds the legislative power of taxation, and violates the provisions of the constitution, is not a law, and the person subjected to said tax is deprived of his property without due process of law."

"Illegal taxation is a deprivation of the citizen's right of property without due process of law."

In addition to levying so-called general property taxes, the states, under their police

powers, have a right to enforce collection of license or inspection fees, or privilege taxes; but it must be kept in attention that states cannot enact a revenue law by decorating the same with garments usually worn by police regulations. In other words, the courts will remove the cloak and investigate as to whether or not an act is a *bona fide* police regulation or a revenue measure in disguise. Speaking generally, the law will be tested by the result of its operation and subsequent legislation on the subject. The legislature may make any business requiring police regulation pay the expenses of regulating it. The amount of the fees required is, within reasonable limits, for the legislature.

The following cases afford illustrations of invalid police regulations:

In *Foote* v. *Maryland*, 232 U. S. 494, for the two years that the Oyster Inspection Law had been in force, the result was as follows:

Year	*Receipts*	*Expenses*	*Percentage of receipts used for expenses.*
1909....	$38,[illegible]	$14,[illegible]	35[illegible]
1910....	43,872	14,991	34%

In *Bartles Northern Oil Company* v. *Jackman*, 150 N. W. 576, which is the North Dakota Oil case, the statute had been in force five years, with the following result:

Year	*Receipts*	*Expenses*	*Percentage of receipts used for expenses.*
1909....	$45,603.55	$8,[illegible]88.75	19[illegible]
1910....	59,503.64	11,930.70	20[illegible]
1911....	71,422.20	12,8[illegible]0.75	18[illegible]
1912....	95,185.02	12,203.60	13[illegible]
1913....	110,404.97	13,382.79	11[illegible]

In the Ohio Oil case, *Castle* v. *Mason*, it was shown that the inspection law of Ohio, adopted in 1908, had the following result:

Year	*Receipts*	*Expenses*	*Percentage of receipts used for expenses.*
1908....	$[illegible]3,8[illegible]	$21,7[illegible]	[illegible]8[illegible]
1909....	88,037	36,999	42%
1910....	[illegible]0,525	[illegible],[illegible]48	[illegible][illegible]
1911....	10[illegible],[illegible]72	[illegible]0,8[illegible]5	[illegible][illegible]
1912....	12[illegible],[illegible]03	[illegible]8,570	[illegible][illegible]
1913....	[illegible]3,[illegible]07	[illegible]2,[illegible]58	[illegible]2

In considering the limitations on taxation, especially in view of the good roads spirit, which is so commendable and widespread at the present time, it is important to note the provisions of sections 5 and 16 of Article 9 of our state constitution, which in part read as follows:

"5. . . . . The state shall never contract any debts for works of internal improvement, or be a party in carrying on such works, except in cases where grants of land or other property shall have been made to the state, especially dedicated by the grant to specific purposes, and in such cases the state shall devote thereto the avails of such grants, and may pledge or appropriate the revenue derived from such works in aid of their completion."

"16. For the purpose of lending aid in the construction and improvement of public highways and bridges, there is hereby created a fund, to be known as the 'state road and bridge fund.' Said fund shall include all moneys accruing from the income derived from investments in the internal improvement land fund, or that may hereafter accrue to said fund, and shall also include all funds accruing to any state road and bridge fund, however provided.

"The legislature is authorized to add to such fund, for the purpose of constructing or improving roads and bridges of this state, by providing, in its discretion, for an annual tax levy upon the property of this state, of not to exceed in any year one mill on all the taxable property within the state. Provided that no county shall receive in any year more than three (3) per cent or less than one-half (½) of one (1) per cent of the total fund thus provided and expended during such year."

In the case of *Cook* v. *Iverson*, 108 Minn. 388, our Supreme Court held that public highways are included in the prohibition contained in section 5 of Article 9, to the effect that the state shall not be a party to the carrying on of works of internal improvement. In that case, the court further held that the power of the legislature to aid in the construction of highways, by appropriating money raised by a general tax levy, is limited to the manner and amount prescribed by section 16 of Article 9. In this connection I am informed that a proposed constitutional amendment for legislative consideration has been drawn, and will remove all limitations as to the taxation of motor vehicles and provide for the distribution of funds derived from such taxation on so-called trunk highways of the state.

Some people entertain the belief that all constitutional limitation as to taxation and exemptions should be removed so that the legislature from time to time might provide for the raising of public revenue in any manner which it deems proper. A so-called wide-open tax amendment would, generally speaking, bring about such result. Personally I do not believe that if all limitations were removed a chaotic or disastrous result

would necessarily follow. In some states we find liberal taxation provisions. For instance, in Connecticut the constitution contains absolutely no limitation of taxation except that the bill of rights has the usual provision to the effect that property of no person shall be taken for public use without just compensation therefor. The courts of that state have held that taxation is not the taking of private property without compensation but have, under the bill-of-rights provisions, placed a narrow construction on what constitutes public use.

In Wisconsin it is provided by constitutional provision:

"The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

As there is no limitation on exemptions in Wisconsin, we find a larger exemption list covering practically four statute pages. In the list there is enumerated, among other things, the following: growing crops, including medicinal plants; mechanics' tools; firearms; honey bees; chickens and farm animals born after December 31st and before the date of assessment; and beet sugar factories and plants.

THE FUTURE OF REAL ESTATE

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As a result of the war nearly all governments, national, state or local, are faced by the necessity of providing for larger expenditures than in the past, and there has been some question as to whether the sources of revenue previously relied on will be sufficient for the present need. Inasmuch as the general property tax, more specifically the tax on real property, is the chief reliance of local governments in the United States, it is essential to ascertain whether more revenue can be raised from this source. From many sides comes a negative opinion: the rate of tax is now as high as can be successfully administered or tolerably borne; this is the opinion of the taxpayers and of many tax collectors, and it is one I have no desire to dispute. But the yield of a tax depends not only on its rate, but also on the value of the taxed property, and that value is the subject of this paper.

The value of land is fundamentally determined by the demand for it. In cities this means the demand for buildings of all sorts, and for sites for them, and this demand in turn results from the conditions or prospects of business and the growth of population.

Besides the demand for buildings, the cost of erecting and maintaining them comes into the determination of land values. This includes costs of material and of labor, and taxes. Finally, the rate of interest determines the relation of the assessed capital value to net rentals.

Any attempt to foresee the future course of land values must consist in an analysis of each of the above-mentioned factors. Some of them are much affected by purely local circumstances; some on the other hand are nation-wide phenomena, and it is this second class alone concerning which the following notes are submitted.

Concerning immediate prospects there is not much to be said. This is dangerous ground for prophets. One fact, however, is to be emphasized: the number of business failures, and the amount of their liabilities, has been very small since April, 1917, and getting smaller right along. The percentage of business firms failing in 1918 was the smallest in thirty years; the number of firms in business decreased slightly, but it was through solvent withdrawal, not bankruptcy. Bradstreet's figures for the first three months of this year show a smaller number of failures than for thirty-eight years past, with a total of liabilities considerably smaller than usual in the last decade. The year 1915 seems to have weeded out the weaklings of business, and if there is no more trouble in Europe, business prospects are far from gloomy.

Whatever may be the case with respect to business, there is another source of demand for city land—the demand for residential buildings, which depends of course

on the numbers of the people. It is necessary, therefore, to study the growth of the population of this country during the past few years.

There are two ways in which a population can grow, (1) by natural increase, or the excess of births over deaths, and (2) by immigration. The first method has not been interrupted by the war, although the second has. The first method will continue after the war, and the second may be resumed, at least in part. We can establish by analyzing these methods, probable minimum and maximum rates of population increase.

The annual estimates of population furnished by the Census Bureau are merely mathematical expressions of the arbitrary assumption that population has been increasing in arithmetical proportion since 1900, i. e. that if the ten years from 1900 to 1910 gave a certain increase in numbers, that each year since 1910 has given one-tenth as much. This, of course, makes no distinction between the two methods of increase just mentioned, and makes no allowance for local conditions, or even nation-wide changes.

More accurate indications of the growth of cities may be obtained from the records of births, marriages, and deaths; from school enrollments; and perhaps from lists of registered voters, city and telephone directories, and other purely local sources, if scrutinized with sufficient care.

The census estimate, however, may be mentioned for what it is worth. It assumes that each month the population of the United States increases approximately 135,000. This would mean that in the two years since our declaration of war, the population has increased over 3,250,000, or 722,000 families, at the average rate of 4.5 persons to the family. This estimate may be reasonably taken as a maximum. According to the last census the number of dwellings in the United States averaged about seven-eighths the number of families.

Recent enough statistics of births, deaths, and marriages to show the results of the war have not been published for the nation as a whole. The experience of Great Britain was that war stimulated marriages and also cut down the death-rate among children. The number of marriages in England in the first three years of the war was 100,000 greater than normal; in Scotland, 4,000. The provisions of the draft law, doubtless, brought about a similar result in this country. Most marriages, of course, increase the demand for houses, even if they are childless; and it is not reasonable to expect many of them to be childless. Another factor in natural increase is the number of deaths. In ordinary years the death rate in the United States is about 15 per 1,000, or, roughly, 1,500,000 persons. The deaths of soldiers during the war are given as under 60,000. Even the influenza epidemic resulted in only about 80,000 deaths, according to the common newspaper estimates. No one can tell how many of these 140,000 cases would have died anyway during the year. In any case they are few by comparison with the regular annual loss.

The death statistics of 1917 are available for nine cities (Seattle, Richmond, Newport, R. I., Concord, N. H., Worcester, New Bedford, Fall River, Newton, and Minneapolis) and one state (Louisiana). Of the cities, Richmond and Worcester actually had fewer deaths than in 1916, while Seattle, New Bedford, Fall River, and Minneapolis reported lower death rates. As the basis of measuring rates is the artificial figure of the Census Bureau, it may be that a small death rate indicates merely a smaller increase in population than was assumed. The normal excess of births over deaths is about 10 per 1,000. If this remained unchanged during the war the population would have increased in the twenty-five months of war by over 2,000,000, in spite of the fact that immigration was cut off. Deduct the 140,000 mentioned above, and there is still a large number of persons to be provided with houses.

The number of children enrolled in the public day schools of the cities of the United States is reported annually or biennially by the Bureau of Education. These school children at the last census were 19.3 per cent of the total population, or practically one-fifth. If the enrollment in the schools of any city increases considerably, it is safe to assume that the population has increased, although not necessarily in proportion. If the increase is greater than in normal years, the conclusion is even more justified. The reason why the enrollment of school children cannot be considered as indicating proportional changes in city

population is due to the fact that these children have to a large extent lived in the city some years before being enrolled in the schools; moreover, the attendance laws are from time to time made more rigorous.

The enrollments of school children for the year 1917-18 have not yet been published, but the figures for twenty-three of the principal cities were kindly furnished by the Bureau of Education. There were no reports made for the year 1916-17, but a comparison with the two preceding years gives the following results:

Total Enrollment Reported

1914-15	1,765,062
1915-16	1,818,612
1917-18	1,925,997

The twenty-three cities together gained 3.05% from 1914-15 to 1915-16, and 5.88% from 1915-16 to 1917-18, or at the rate of 2.89% per year (geometrical proportion). That is, the rate of growth was over nineteen-twentieths of the rate in the year preceding the war, and the growth in absolute numbers almost identical. These cities contain about one-twelfth of the nation's population; they are all of such a size that purely local occurrences, such as the establishment of government plants or stations near them would not affect their figures to such a great extent as would be the case with smaller cities.

As for the second means by which the population is increased, i. e. immigration, it is well known that the war reduced the immigration from an annual average of over 1,000,000 to an insignificant amount. Can we expect now a volume of immigration as great as before the war? The answer depends on the demand for laborers abroad as well as in this country, and also on the nature of the restrictions on emigration and immigration.

In May, 1917, new restrictive laws went into effect, the principal restriction being the requirement that aliens over 16 years of age must be able to read in order to be admitted. The effect of this law in keeping out immigrants after the war cannot be stated with confidence. There may be further restrictions enacted, by this country or by the countries of origin. Keeping out illiterates may encourage the other kind of immigrants. Of the immigrants admitted in the years preceding the adoption of the literacy test, the following percentages were illiterate:

1913	3.1
1914	3.3
1915	13.—
1916	14.—
1917	12.—

In conclusion, one thing seems plain: if this country has had a demand for labor great enough to cause its population to grow at the rate of over 1,600,000 a year, that demand is not going to disappear all at once; and if it is not satisfied by one means, it will be by another. In other words, if immigration should be less in the future than it has been in the past, the native population will probably increase faster in consequence, and, during the interval while the younger generation is still unable to compete, wages will be higher than normal, thus enabling workingmen to live in larger quarters. Moreover, some of the Liberty bonds acquired in such large numbers by workingmen will doubtless be converted into homes when they return to par. So, in one way or another, a greatly increased demand for residential accommodation seems inevitable.

It is well known that at the present time there are few vacant houses and that rents are high. There has been very little building except for governmental purposes during the last two years. Profits not absolutely necessary have been held up by the high cost of labor and material, and perhaps even more by the scarcity of capital. Estimates of the amount of private and public construction so affected vary from $300,000,000 to $450,000,000.

Enough evidence has been produced to indicate at least a normal growth in the amount of taxable real estate; but there are some other factors affecting its assessable value. First of these is the purchasing power of money, indicated by the general level of prices.

Building materials, like nearly everything else, have risen to prices two or three times as great as in 1914. Some of this rise was due to scarcity; some simply to the decline in the value of money. That part of the increase which was due to scarcity cannot long endure after peace is fully restored and the laborers now in the army set free; that part which was due to the declining value of money will probably

last for some time, depending on the financial policy of the government. Buildings will accordingly be dear, but since incomes are in the process of adjustment themselves to the lower value of money, the high money cost of buildings will not cause a decline in the demand for them, for the tenants will be able to pay more. There will be as much construction as there would be if prices in general were lower, and each building will increase the assessed valuation of the city by a greater sum than it would have before the war.

There is another reason to believe that there will be an increase in the value of real estate. Like all forms of investment, real estate derives its value from the income it yields. The larger the net rent, actual and expected, the greater the selling value. But the ratio between the two is not uniform; it fluctuates with changes in the normal rate of interest on long-term investments of equal security. Now at the present time that rate is very high; good bonds which in 1914 yielded only 4.6% now yield 5.4%; even U. S. bonds, issued at 3½% per cent, now sell in the market to net 4¾%. Looked at from the other side, investments yielding a stated income are worth now only between three-fourths and five-sixths of what they were five years ago. As soon as the demand for capital declines, or the supply increases, enough to reduce this rate of interest, the capital values of all income-yielding properties, including real estate, will rise. This rise will be more noticeable in the case of land than in that of improvements, for the value of the latter is more closely connected with the costs of construction. If, for example, an improved piece of property should increase in value because of a fall in the market rate of interest, while building costs remained unchanged, the building would not be valued any higher than the cost of replacing it, however small that might be, and the land would be credited with the whole of the increased value of the property.

At the present time the total assessed valuation of the real property in cities of 30,000 or over is about $30,400,000,000. Since 1913 this total has increased from year to year barely enough to keep pace with the increased number of such cities and their growth in area. The assessed values of properties already on the books seem to have remained stationary or even declined, taking the country as a whole. These conclusions are based on the Census Bureau's statistics, including those for 1918 which are not yet published. The rising cost of materials, and rate of interest have kept values down. When these costs decline, values may be expected to go up.

How soon may this rise in assessed valuations be expected? This is a difficult question to answer, depending on all the factors mentioned above. The demand for houses is already effective; that for business buildings depends mainly on confidence. The costs of a few materials have started down, as have commodities in general;[1] carpenters are not now so hard to find; and after the Victory loan is out of the way, the savings banks will have more money for mortgages. In fact, the value of building permits taken out in March was greater than in any month since June, 1917.

The effect of a fall in the rate of interest will be slower to manifest itself. After the Napoleonic wars it took three years for the rate of interest on investments in Great Britain to decline noticeably. After the American Civil war and the Franco-Prussian war it took five years for the same phenomenon to manifest itself in the respective countries. We have not suffered as much in this war in proportion to our wealth as the countries concerned in those three instances. Europe may keep up the interest rate by borrowing our capital, but it is a question how willing American investors would be to lend abroad. On the whole, it is better to invite each reader to decide for himself how soon real estate is to take part in that upward swing of prices in which it alone of all commodities has not yet shared. Meanwhile assessors must derive their consolation from the increasing amount of taxable real estate rather than its increasing value.

[1] Bradstreet's and Dun's index numbers of commodity prices were on April 1, respectively, 6.7% and 4.4% less than on January 1.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

CAR COMPANY TAXATION—UNIT RULE —MILEAGE BASIS. — The Supreme Court has held unconstitutional a Georgia statute imposing a property tax on rolling stock of equipment or private car companies, reversing the state court (146 Ga. 489).

The law (Civil Code, secs. 989, 990, 1031), provided that the assessment of such property should be made on the basis of the percentage of the value of total equipment owned by the company, which the number of miles of railroad line over which its cars traveled in Georgia, bore to the total railroad line mileage everywhere over which they traveled. This rule, it may be noted, is not that of total number of miles traveled by the cars, i. e., car wheelage or car mileage, but involves only railroad line miles, irrespective of the number of cars running over the tracks, or the number of trips made by the cars.

In the particular case the application of the statutory rule resulted in an assessment of $291,195, whereas the physical value of the average number of cars habitually used in the state for the year was admitted by the state to be only $47,310. The additional assessment, reached by the application of the statutory method, was sought to be justified under previous decisions upholding the "unit rule" of taxation for such properties and as reflecting a proportionate value for the franchise. The plaintiff contended that the rule of railroad trackage had no necessary relation to the amount of its property in the state, and the Supreme Court, while admitting the general validity of the unit rule in the valuation of such property and that the value need not be limited to the mere physical worth but may include the "intangible value due to what we have called the organic relation of the property in the state to the whole system," held that the method used was arbitrary, producing results wholly unreasonable, and a tax unduly burdening interstate commerce and imposed without due process of law.

The decision in *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18, urged in support of the tax, was distinguished on the ground that the real issue in that case was whether the property was exempt from taxation merely because of its employment in interstate commerce, and that the statements in the opinion as to the propriety of a track mileage basis of assessment were unnecessary to determination of the case and, so far as specific sanction of the track mileage as a basis of apportionment was given, it was *obiter dictum*, and could not be approved or followed.

The court admits the difficulty of fairly appraising such property, but says that "Taxes must follow realities, not mere deductions from inadequate or irrelevant data," and that "under no formula can a state tax things wholly beyond its jurisdiction."

Justice Day concurred in the result in view of the undisputed facts and Justice Pitney wrote a vigorous dissenting opinion, in which Justice Brandeis and Justice Clarke concurred, taking sharp issue with the prevailing opinion as to the reasonableness of the rule laid down in the Georgia statute, and protesting against the interpretation placed on the *Pullman* case. Justice Pitney says that, although a state may properly assess railroad car equipment on the basis of the average cars in habitual use, it is not confined to that method, nor is it obliged to disregard "the special value that rolling stock has because of its organic relation to, and its customary use in connection with the railroad tracks upon which it runs," since "although the equipment be held in separate ownerships, it may be regarded in fact as an appurtenance of the railroad and valued in that relation." He takes the view that the propriety of the railroad track rule was in issue and was approved by the Supreme Court in the *Pullman* case, and that this case has been uniformly cited as sustaining that proposition, and he thinks that under the prevailing opinion, its authority has been overthrown. He also intimates that the car wheelage or car mileage method of apportionment, suggested by the

majority as a proper rule may itself be invalid as a regulation of interstate commerce, and may be also objectionable because "its ascertainment would lie wholly in the breast of the taxpayer."

It would indeed seem revolutionary to at this time overthrow the authority of *Pullman Co.* v. *Pennsylvania*, and we call attention to the finding of fact by the trial court in the instant case, that railroad track mileage has no relation whatever to the number of cars or amount of equipment in use in a state. This seems to have been overlooked by the dissenting justices. In none of the cases cited by the court, which involved a car equipment company, was the reasonableness of a track mileage rule, *as applied to such a company*, questioned. The Supreme Court in the present case has done nothing more than to say that such a rule does not apply to a car equipment company. It has not disturbed the reasonableness of the track mileage rule as applied to other kinds of car companies nor has it held that the unit rule is not applicable to car equipment companies such as were involved in the case under consideration, so long as the apportionment of value to a state is based upon some reasonably fair method such as the car mileage or wheelage basis.

Justice Pitney observes that the decision of the majority will embarrass a considerable number of states which have relied upon the Pullman Company case in modeling their tax statutes. So far as car equipment companies are concerned, however, it may be noted that there are practically no states which employ the railroad track mileage rule to such companies and that almost all employ the *car mileage rule*, which Justice Pitney seems to think impracticable in administration.—*Union Tank Line Co.* v. *Wright*, U. S. Sup. Ct., March 24, 1919.

Tax on Billboard Advertising.—The validity of an ordinance of St. Louis imposing restrictions on the size and manner of erection of billboards and requiring a license for the same when affixed to private property, has recently been sustained by the United States Supreme Court, affirming the decision of the state court (195 S. W. 717). The claim of violation of the due process and contract clauses of the constitution was made and that the ordinance imposed unreasonable and unconstitutional limitations on the liberty of the individual and rights of property in land. The court brushed these claims aside as having been disposed of when the correctness of the decision in *St. Louis Gummy Advertising Co.* v. *St. Louis*, 235 Mo. 99, was recognized in the decision in *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 529, 530, thus establishing the principle that "billboards properly may be put in a class by themselves and prohibited in the residence districts of a city in the interest of the safety, morality, health, and decency of the community." To the suggestion that in this case it was shown that plaintiff had done away with dangers from fire and wind, the court observes that these "are or may be the least of the objections adverted to in the cases" (235 Mo. supra, *Kansas City Gummy Advertising Co.* v. *Kansas City*, 240 Mo. 659, 671). While minor requirements stand on æsthetic grounds as the main ones stand on other ground, the court is not prepared to deny the validity of trifling requirements (*Hubbard* v. *Taunton*, 140 Mass. 467). The city might, if it desired, discourage billboards by a high tax.

As to the impairment of contracts entered into before the enactment of the ordinance, the court holds that such contracts must be deemed made subject to subsequent legislation, not otherwise invalid except for its incidental effect upon them (*Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558.—*St. Louis Poster Advertising Co.* v. *St. Louis*, U. S. Sup. Ct., March 24, 1919.

Situs.—Professor Beale of the Harvard Law School contributes a useful article in the April issue of the *Yale Law Journal* under the title, "The Situs of Things." He discusses the recent cases as to situs under the following headings: Land, and things connected with land, such as franchises, water powers, gas and water mains; chattels, which is subdivided into property in transit, property merged in a document such as a bill of lading or warehouse receipt, and property under the control of a court. Under the first subdivision, he examines dealings in transit; live stock; vessels; rolling stock; machinery; logs and other products of the soil; and exports and imports.—*Yale Law Journal*, XXVIII, 6, April, 1919.

"Munitions Manufacturers." — A steel company contracting to deliver howitzer shells to a foreign government, which manufactured bars from which shells are made and turned them over to subcontractors for completion, retaining ownership, paying subcontractors, and afterwards delivering shells under its contracts, is subject to the tax imposed on "munition manufacturers" by the Act of Sept. 8, 1916, sec. 301, upon the "entire net profits actually received . . . from the sale" of the shells under contract. — *Carbon Steel Co.* v. *Lewellyn*, 255 Fed. 364.

Constitutional Limitation on Federal Tax Power.—The provision of the Harrison Drug Act (Act Dec. 17, 1914), making it unlawful by means of the order forms to obtain any of the drugs, the dealing in which is regulated by the act, for any purpose other than the use, sale, or distribution thereof by the person in the conduct of a lawful business in said drugs or in the legitimate practice of his profession, is unconstitutional, as not within the taxing power of Congress, which includes no right to make any specific use of an article upon which the tax is paid, unlawful.—*Blunt* v. *United States*, 255 Fed. 332.

Mine Taxation—Valuation. — Mine property surrounding a proven mine, although in the prospective stage, may be given an assessed valuation as a prospect where there is reason for assessing officers to find and believe that the property has coal values. It is unnecessary for county assessors and board of equalization to be mining experts or to employ experts to make assessments where they are familiar with the properties and with owners of similar properties and exercise their judgment through examination and inquiry. Valuations placed upon property for purposes of taxation will be presumed to be reasonable, and such presumption can be overcome only by proof that is clear and convincing.—*Washington Union Coal Co.* v. *Thurston County*, 177 Pac. 774.

Exemption from Taxation of Property of Indians.—The general rule that property issued to the Indians by the United States, to enable them to maintain themselves upon the land allotted to them and to induce them to adopt the habits of civilized life, established by the decision in *United States* v. *Rickert*, 188 U. S. 432, and extended to include increase in the issued property and property purchased with the proceeds of the sale thereof, by the decision in the case of *United States* v. *Pearson*, 231 Fed. 270, was recently applied to the case of the claim for exemption for sheep, which, it was shown, included those originally acquired by the Indian as the result of original grants of property by the United States and the increases thereof. — *Olney* v. *McNair*, 177 Pac. 641.

Exemptions.—A statute of New Jersey (P. L. 1913, p. 570) provides for exemption from taxation of land "actually used for charitable purposes." At the time for assessment in the city in question the land of complainant was vacant, the buildings having been destroyed by fire. The land was assessed and the assessment was upheld upon the ground that the statute contemplated the *use* of the property as an important and necessary element in its exemption.—*Y. W. C. A. of No. Phila.* v. *Monmouth Co. B'd of Taxation*, 105 At. 726.

Income—Profit on Sale of Assets.—Complainant was assessed an excise tax under the act of 1909, based upon profit shown on sale of its property as compared with cost. The court below vacated the assessment as not being levied upon income, relying upon *Gray* v. *Darlington*, 15 Wall. 63, involving the construction of the revenue act of March 2, 1867, and following *Hays* v. *Gauley Mtn. Coal Co.*, 230 Fed. 110. The appellate court called attention to the fact that the supreme court had reversed this case and had distinguished the corporation excise tax act from the act construed in the Darlington case, holding that "where property is sold by a corporation at an advance over the original purchase price, the amount of the advance must be deemed a gain or profit for the purpose of computing income for taxation under the present law." This ruling was held decisive.—*Scott, Collector* v. *Schwab*, 255 Fed. 57.

Equalization.—Under a statute of Nebraska, authorizing county boards to "increase or diminish the aggregate valuation

of property in any township, precinct, or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of property in the county," an increase in a given precinct is unauthorized, in the absence of a showing that the valuations there do not bear a just relation to all other valuations in the county.—*Peterson* v. *Brunzell*, 170 N. W. 905.

Banks—"Moneyed Capital." — In a recent Virginia case, one of the questions presented was whether the effect of the so-called "segregation act," as construed in *Richmond* v. *Drewry-Hughes Co.*, 94 S. E. 989, and in *Tresnon* v. *Board of Supervisors*, 90 S. E. 615, produced a tax on bank shares repugnant to the federal statute. In the case in question such shares were taxed at $1.40 per $100, whereas "moneyed capital" of individuals was taxed at 30 cents per $100.

The court suggests that obviously the general purpose of the federal statute was to prevent discrimination by the states in favor of state banking associations against national banking associations, a situation which was not shown to exist in this case.

A quotation is inserted from 9 U. S. Comp. Stat. (1919), title "National Banks," at p. 11993, note 29, where it is stated that "moneyed capital" as used in the federal statute means capital engaged in the operations of banking which is used as a source of profit. The following cases are cited: *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138; *Nat. Bank* v. *Boston*, 125 U. S. 60; *Palmer* v. *McMahon*, 133 U. S. 660; *Talbott* v. *Board of Commiss'rs*, 139 U. S. 438; *First Nat. Bank* v. *County of Chehalis*, 166 U. S. 440; *Amoskeag Sav. Bank* v. *Purdy*, 231 U. S. 373.

These decisions were declared to render the claim of discrimination in the instant case groundless. — *City of Richmond* v. *Merchants' Nat. Bank*, 98 S. E. 643.

Banks.—A statute of Montana (Ch. 31, L. 1915) which follows the ordinary form for the taxation of bank shares and which has been universally assumed not to conflict with the federal limitations, has been held to produce unconstitutional taxation of such shares because in conflict with a clause of the state constitution.

The statute in question provided for the deduction of the assessed value of the bank's real estate from the total value of the stock, surplus, and undivided profits. The proofs showed that the total investment in real estate was $344,358, whereas the assessed value, which was deducted by the assessor, was $229,730. The court held that the provisions of section 17 of article 12 of the constitution, providing that nothing therein should be "construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks [included in the definition of property] is within the state and has been taxed," required the deduction of the total investment in the real estate in reaching the value of the stock, that otherwise the stock would be assessed at a greater rate than other "moneyed capital," in conflict with the federal limitation (*First Nat'l Bank* v. *City*, 61 Pac. 778; *First Nat'l Bank* v. *City Council*, 52 N. W. 334).—*Dennis* v. *First Nat'l Bank of Great Falls*, 178 Pac. 580.

Railroad Bridge not a Railroad—Effect of Federal Operation. — In a recent case involving mainly a question of procedure, it was held that a railroad bridge owned by a bridge company and used by several railroads was not a railroad and assessable by the state board of equalization, but was real estate assessable by the local assessor; that whether the act of Congress of March 21, 1918, taking over the railroads, applied and had any bearing upon the pending action to sell the bridge for delinquent taxes, was a question that could only arise between the federal government and the state; that where there was a legal objection to the assessment in that it was alleged that the rule of uniformity was violated, the courts will give relief, and failure of the taxpayer to raise this objection did not justify summary dismissal of the objections filed. — *People* v. *Keokuk & Hamilton Bridge Co.*, 122 N. E. 467.

Capital Stock—Elements in Valuation—Indebtedness.—By the statutes of Iowa the capital stock of the class of corporations in question in a recent case, is required to be assessed at its actual value over and above the value of the property of the corporation. Upon appeal from an

assessment, it was shown that the physical property was assessed at $177,000, the net earnings for one year were $33,564, the plant was valued by an appraiser shortly after the assessment was made at $320,253, and shortly thereafter was sold for $400,000, the purchaser assuming bonded indebtedness of $150,000 and paying in cash $250,000. The par value of the stock was $300,000, but none had ever been sold upon the market. The officers urged, among other things, that the franchise was shortly to expire and that the indebtedness should be deducted from the par value of the stock. The court held that where the property consists exclusively of real estate and other tangible property, the indebtedness must be taken into account though not deducted; that the value of the business, its earning power, the size of its dividends must always be taken into consideration (*City of Marion* v. *C. R. & M. Ry. Co.*, 94 N. W. 501; *Electric Light Co.* v. *McCrary*, 110 N. W. 19). As the property had been sold for a sum, leaving a net cash value of $250,000, that would fairly represent the value of the stock.—*Marshalltown L. P. & Ry. Co.* v. *Welker*, 170 N. W. 384.

Assessments — Arbitrary Action of Officers.—Where in a recent case it was shown that real estate of complainant was arbitrarily increased six times the valuation returned by the owner, and such increase was approved by the assessing body under such circumstances as to indicate lack of exercise of care and judgment, the increase was canceled as being in effect a fraudulent assessment in disregard of the rights of the taxpayer. An assessment must be the result of honest judgment and not mere will (*C. B. & Q. R. R. Co.* v. *Cole*, 75 Ill. 591). An assessment made in disregard of the board's own rules as to valuation of property cannot be sustained (*C. & C. C. & D. Co.* v. *O'Connell*, 106 N. E. 452; *Peoples Gaslight & Coke Co.* v. *Stuckart*, 121 N. E. 629). Where the valuation is so grossly out of the way as to show that the assessing body could not have been honest in its valuation and must reasonably have known that it was excessive, such fact is accepted as evidence of fraud on its part against the taxpayer. (*First Nat. Bank* v. *Holmes*, 92 N. E. 893; *State Board of Equalization* v. *People*, 61 N. E. 339; *Burton Stock Car Co.* v. *Traeger*, 58 N. E. 418).—*People* v. *C. L. S. & E. R. Co.*, 122 N. E. 109.

Real Estate — Reservoir Rights — Dams as "Improvements."—In a recent Colorado case the assessor assessed the land of a reservoir company, including that covered by a dam and the reservoir site, and added, under protest of the company, a further value reached by considering the cost of construction of the dam, as an "improvement." Upon appeal it was held that this was not authorized within the meaning of the revenue laws (*Kentrick* v. *Twin Lakes Res. Co.*, 144 Pac. 884; *Shaw* v. *Bond*, 171 Pac. 1142). While the value of the water rights remaining unsold might have been a proper subject of assessment, the cost of construction of the dam was not a proper basis of its value, and furthermore the proof showed that the assessor in fact did assess the dam as an "improvement" and did not use its value as such basis of value for the unsold water rights.—*Antero & Lost Park Res. Co.* v. *Board of Commissioners*, 177 Pac. 148.

Licenses — Local vs. State Fees.—The general highway law of Oklahoma (Chap. 173, L. 1915), contained provisions for registration fees on motor vehicles which were declared to be "in lieu of all taxes, general or local, to which motor vehicles may be subject as personal property," and it was further provided that "local authorities shall have no power to pass, enforce, or maintain any ordinance, rule or regulation requiring . . . any tax, fee, license or permit for the free use of the public highways," with the proviso that "the powers given to local authorities to regulate vehicles offered to the public for hire . . ." should "remain in full force and effect."

Under this proviso, an ordinance of the city of Oklahoma regulating the use of motor vehicles and requiring a license obtainable upon registration and payment of fees fixed therefor, was held valid as a proper exercise of the police power and not a revenue measure, citing *Ex parte Mayes*, 167 Pac. 749; McQuillan on Municipal Corporations, vol. 3, sec. 1002.—*Ex parte Holt*, 178 Pac. 260.

License — Gross Sales — Interstate

Commerce.—A statute of Louisiana (Act No. 171 of 1898) provides for a graduated license tax upon mercantile houses, based upon gross sales, the subjects being divided into several classes with respect to the amount of their sales. Complainant resisted the tax sought to be imposed upon it based upon its total sales, upon the ground that a large portion of such sales were interstate commerce transactions and should be eliminated in determining the class into which it should be placed. The court reviewed the leading cases, reaching the following conclusions: that the claim that the tax was not in terms upon interstate commerce, but that sales made in such commerce were merely used in part as the measure of the license for intrastate business, was untenable, citing as conclusive *Int. Paper Co.* v. *Mass.*, 246 U. S. 135, *Looney* v. *Crane Co.*, 245 U. S. 178, and its own decision in *Shreveport* v. *N. Y. Life Ins. Co.*, 75 So. 80; that the vice of the tax in question was that it varied in proportion to the receipts and was thus not within the saving provisions of the decision in *Armour & Co.* v. *Virginia*, 246 U. S. 1; that the tax here was directly proportionate to the receipts and not an indirect burden, such as was held to be the effect of the taxes held in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, and in *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500. The conclusion was that the tax should be computed excluding sales in interstate commerce and the class to which complainant belonged, thus ascertained. The court rests its conclusion, after a full review of the decisions, upon what it terms "two late and most pertinent decisions of the United States Supreme Court," viz.: *Heyman* v. *Hays*, 236 U. S. 178, and *Crew-Levick* v. *Pennsylvania*, 245 U. S. 292, cases which are stated to involve the same facts and in which the tax was declared invalid upon the same principle.—*State* v. *Albert Mackie Co.*, 80 So. 582.

License Taxes—Local Option.—In a recent important decision, the Ohio supreme court lays down the rule with respect to the powers of a city operating under a so-called "home rule" charter, to impose local license taxes. The head notes are as follows:

1. The State of Ohio, under the provisions of section 10, article xii, of the constitution, has authority to levy excise taxes in the form of an occupational tax.

2. Under the grant of power of local self-government provided for in section 3, article xviii of the state constitution, the city of Cincinnati, as long as the State of Ohio through its general assembly does not lay an occupational tax on businesses, trades, vocations, and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes.

3. The ordinance of the city of Cincinnati providing that an annual tax shall be levied upon all persons, associations of persons, firms and corporations pursuing any of the trades, professions, vocations, occupations and businesses therein named, is a valid exercise of the legislative power of such city.—*State ex rel. Zielonka* v. *George P. Carrel, Auditor*, Ohio Supreme Court, January, 1919.

Inspection Fees — Interstate Commerce.—The United States supreme court has just reversed the state court in a case involving the validity of a statute of the state of Washington (Rem. Code, sec. 6051 *et seq.*) known as the State Oil Inspection Law, holding the same unconstitutional upon the ground that the inspection fees were so largely in excess of the reasonable cost of inspection as to constitute a direct burden on the products inspected which were moving in interstate commerce.

The state court (162 Pac. 558) upheld the tax as a proper excise or occupation tax upon the business of selling oil within the state, but it was held that the necessary effect of such a tax must be considered without regard to the state court's designation. It was held that while articles brought into a state in interstate commerce may be subjected to proper inspection fees, such fees must be reasonably proportionate to the cost of such inspection (*Foote* v. *Maryland*, 232 U. S. 494), otherwise they will be declared void as constituting in their operation, an obstruction to and a regulation of interstate commerce. The cases of *General Oil Co.* v. *Crain*, 209 U. S. 211, and *Bacon* v. *Illinois*, 227 U. S. 504, relied upon by the state, were held not in point, as, in these cases, the articles subjected to the fees were held to have "come to rest" in the state and thus to have been withdrawn from the operation of the com-

merce clause. The court observes that the supreme courts of North Dakota and Ohio have reached conclusions in line with its own (150 N. W. 576; 110 N. E. 463).—*Standard Oil Co.* v. *Graves*, U. S. Sup. Ct., April 14, 1919.

License—Telegraph Companies—Interstate Commerce.—A statute of Florida (Comp. Laws 1914, sec. 596 ttt), provides that every telegraph company shall pay a license tax to the comptroller of 65 cents per mile. Complainant company refused to pay the same because imposed upon its entire mileage, although a large portion of such mileage was used solely for interstate traffic. The court sustained the statute as not in its wording, application, and effect burdening interstate commerce, holding that it should not be construed as applying to interstate business under previous decisions (*Osborne* v. *State*, 14 So. 588; *Ferguson* v. *McDonald*, 63 So. 915) but that the mileage upon which the tax should be computed should not include that used solely in interstate commerce, citing *Brown* v. *Maryland*, 12 Wheat. 419; *LeLoup* v. *Mobile*, 127 U. S. 640; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411; *Gray's Limitations*, par. 900.—*Amos* v. *Postal-Telegraph Cable Co.*, 80 So. 293.

Foreign Corporation Franchise Fee—"Authorized" Capital Stock.—Under the Ohio statutes a foreign corporation, in order to obtain a permit to do business in the state, is required to pay a fee based upon such a proportion of its "authorized" capital stock as is represented by property owned and used and business transacted in the state. In a recent case it was decided that, for the purpose of determining the fee, the entire capital stock which the corporation was authorized to issue must be considered, and not the amount issued.—*State* v. *Fulton*, 121 N. E. 697.

Franchise Tax—"Consolidated" or "Merged" Corporations. — In a recent case it was held that when a Virginia corporation absorbed an Alabama corporation pursuant to the authority of the latter state, this was a consolidation rendering the consolidated corporation liable for tax as a domestic corporation in Alabama based upon its entire capital stock.—*State* v. *Atlantic Coast Line Ry. Co.*, 81 So. 60.

State Income Tax—Offset of Property Taxes. — In the income tax law of Missouri (L. 1917, p. 524), by section 32, it was provided that the taxpayer should be permitted to exhibit to the *assessor* his receipt for taxes paid to the state upon real or personal property, to the full amount, in payment of income taxes. Two questions arose: 1. whether the word "assessor" should be construed to read "collector," and 2. whether the taxes to be used as an offset would include taxes paid for school purposes.

It was held that reading the entire act and considering the actual situation, the use of the word "assessor" was to be considered as a verbal inaccuracy and construed as collector. Upon the other point, it appeared that the school tax in question, claimed as an offset, was not imposed by the state but was collected by the state for the benefit of the local school districts. It was held that this could not be included in the offset. To the claim that the deduction should be allowed, to avoid a charge of "double taxation," it is replied that the income tax and the school tax are different *burdens*, being imposed by different jurisdictions.

Judge Graves, who gave hesitating approval of the constitutionality of the act in the test case (205 S. W. 196), takes occasion to give some wholesome advice on bill-drafting, which we insert for the benefit of whom it may concern. He says:

"I feel constrained to concur in this opinion because our learned brother has given, as I think, the best construction that can be given, having in view the awkwardly drawn act (drawn prior to the meeting of the Legislature as current history goes), with which he had to deal. It is to be hoped the future legislation on the subject will be clearer. The whole scheme is an exceedingly close legal question under our constitution. The idea that an "Income Tax" is, in fact and law, a property tax, and therefore violative of our constitution, rises before us as Bancho's ghost. Whilst we have held this illy-drawn scheme constitutional, I joined in the majority opinion in that case with much trepidation and doubt. So that, as above stated, it is hoped that the future legislation upon this subject, when it reaches us (as it no doubt will), will have such clearness of expression as will exclude all legal question except the constitutional question."

—*Am. Mfg. Co.* v. *Koeln. Collector*, Missouri Supreme Court, April 7, 1919.

Jurisdiction to Tax.—A notable contribution to the law of jurisdiction and situs in taxation, is that by Professor Beale in the current (April) issue of the *Harvard Law Review*. This article contains what amounts to a complete and exhaustive review and discussion of the present state of the law, with copious references to the leading cases. The subject is treated under the following headings: Personal Tax; Land Tax; Tax on Chattels; Taxation of Intangible Property; Taxation of Business Capital and Income; Taxation of Property held by Fiduciary; Excise Tax and Inheritance Tax.

Being particularly interested in the author's conclusion as to the taxation of "specialties", i. e. promissory notes and bonds, we note his statement at page 598, that such intangibles "have a situs and are taxable in any state in which they are found." With this conclusion we cannot agree (assuming the absence of a "business situs"), and we find that among the numerous citations, he fails to mention the recent case of *Wheeler* v. *New York*, 233 U. S. 434 (1914), which we have understood to finally decide the matter adversely to the author's view as above stated.

This case, while involving an inheritance tax, was not so treated by Justice Holmes, who wrote the prevailing opinion and who announced the view which Professor Beale states. An examination of the individual views shows, however, that of the eight other justices sitting, only three, Day, Hughes and Lurton, concurred in this position. Justice McKenna, with whom Justice Pitney concurred, held that the principles of jurisdiction in inheritance tax cases governed, and he distinctly rejected the general rule as to situs, announced by Justice Holmes. The Chief Justice and Justices Lamar and Van Devanter held that the situs of a note did not confer jurisdiction even for inheritance tax purposes. We also fail to find among the cases cited the important decision in *Buck* v. *Beach*, 206 U. S. 392.

Of the supreme court decisions relied upon by Professor Beale in support of his view, that in 104 U. S. 592 does not appear to be in point. That in 175 U. S. 309 was examined in the *Wheeler* case and held not to bear out the principle then claimed for it by Justice Holmes. The case in 188 U. S. 189 was an inheritance tax case, was decided upon the principle of control over the transfer, and is hence not in point. We find, moreover, at page 613 of this article an apparent confirmation of one view and a conflict with the one previously stated.

It is a bit disappointing not to find in this article special and distinct treatment of the jurisdiction of the states in personal income taxation, a matter with which many of us have been seriously concerned and which would not appear to have yet been satisfactorily presented.

Interstate Commerce. — In the April *Harvard Law Review*, Professor Powell continues his series of articles already commented upon (see Bulletin, V, 133) and discusses taxes on net income "as such" as affected by the Commerce Clause. It is of the greatest value to have, at this particular time, when the subject is so peculiarly important, this full and illuminating discussion of the intricacies of constitutional law, through which we are being carried by the ingenious attempts at new forms of taxation and the equally ingenious solutions by the United States Supreme Court of the questions raised.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

Oberlin, Ohio

Arizona. Fourth biennial report of the Arizona tax commission. December 31, 1918. 149 p.

A summary of the commission's achievements during the seven years of its existence shows an increase of over 800 per cent in the total duplicate. This increase has been accompanied by a decided shift of the tax burden to mining properties. In 1911 this class paid 19.3 per cent of the state taxes; in 1918, 58.63 per cent. Continued improvement is reported in the co-operation of state and local officials and in the assessment of corporation intangible values.

Bullock, C. J. Taxation. Parts 1-2. *Buildings and Building Management*, February, March, 1919. pp. 27-29; 46-50.

CHASSELL, E. D., and ROBINS, K. N. Rochester, N. Y. The case for and against exemption of United States government bonds and federal farm loan bonds. Chicago, 1919. 38 p.

A summary of various arguments pro and con.

GEORGIA. Report rendered to the special state tax commission by the committee on suggested changes, with special reference to such as will have to follow constitutional amendment. Mss.

KENTUCKY. First annual report of the Kentucky tax commission. 1918. 118 p.

The principal features of the first's year's work have been progress toward uniformity in assessments, a greater return of bank deposits and other intangibles, and wider popular interest in taxation.

MASSACHUSETTS, BOSTON. Finance commission. Report on tax limit legislation. Boston. *City Record*, March 15, 1919. pp. 139-140.

MASSACHUSETTS. Report of the tax commissioner for the year ending November 30, 1918. 176 p.

The report discusses briefly the following topics, the selection of which conforms to the range of the tax commissioner's duties: The taxation of corporations; the income tax; taxes on legacies and inheritances; transfers of stocks; supervision of boards of assessors; the approval of corporate organizations and reports.

The discussion of the operation of the income tax reveals the continued satisfactory character of this tax. The yield is increasing, and the cost of administration in 1918 was 1.44 per cent on a total assessment of $14,400,000. Further experience emphasizes, however, the importance of careful administration.

NEVADA. Biennial report of the tax commission, 1917-18. 49 p.

The two purposes for which the tax commission was established in 1913 were relief from a deplorable situation of the state finances, and the more equitable distribution of the tax burden. The former object has been attained through the absorption of a deficit of $481,000 and the provision of a surplus in the state treasury of a cash balance of as much more. Progress toward the second goal is much slower, but the commission expresses belief that headway in this direction is being made.

NEW MEXICO. Second biennial report of the state tax commission. Fifth and sixth fiscal years, November 30, 1916, to November 30, 1918.

One of their chief difficulties has been the unequal valuations of grazing lands as between different counties. The classification for assessment of such lands is recommended as an aid in securing an equitable valuation. Changes in the laws taxing mines and timber lands recommended, the object being to protect and develop the same. This commission publishes a bulletin (heretofore seven times yearly) containing extracts from the minutes of the meetings of the commission. It is proposed to issue this bulletin monthly, so as to give matters of taxation even greater publicity.

NEW YORK. Annual report of the state tax commission. 1918. Albany, 1919. 95 p.

Recommends the levy of a general personal income tax at a low rate, a tax on business, and a tax at a fixed rate upon tangible personal property, and the abolition of all other personal property taxes.

NEW YORK. Retrenchment, taxation, and tax limitation in New York. Being extracts of reports to the Advisory Council of Real Estate Interests, 55 Liberty Street, New York City. February 19, 1919.

NEW YORK. Annual report of the comptroller for the year ending June 30, 1918.

Part I deals with comments and recommendations; Part II with exhibits and statements; and Part III with the tabulation of budget estimates.

NORTH CAROLINA. Report of the state tax commission. 425 p.

OREGON. Fifth biennial report of the state tax commission to the legislative assembly of the state of Oregon. 1919. 78 p.

Contains the Model Tax System Report of this Association in full.

PONTIFEX, B. The Canadian income war tax act, 1917; with explanations by the minister of finance and instructions of finance department. Table of tax payable by individuals and companies fully indexed. Toronto: Finance Dept. 1918. 43 p.

RHODE ISLAND. Seventh annual meeting of the Rhode Island Tax Officials Association. Bulletin no. 6. February 1, 1919.

SECRETARY OF THE TREASURY. Annual report on the state of the finances. Washington. 1918. 540 p.

Among the exhibits appear many documents of historic interest relating to the issue of bonds, treasury certificates of indebtedness, war-saving certificates, and war-risk insurance.

SELIGMAN, EDWIN R. A. Our fiscal difficulties and the way out. Address before the New York State Tax Association. Albany, N. Y. 1919. 16 p.

Professor Seligman recommends a combination of an income and a business tax as "the way out" of New York's fiscal difficulties. An appendix gives figures estimating the yield of a personal income tax in New York State and New York City, and comparisons with the federal yield.

SOUTH DAKOTA. Emergency tax laws of South Dakota. Issued by the tax commission. 1919.

A reprint of the laws passed by the legislature during the sixteenth session, relating to the following subjects: Mortgage registry tax; the time for listing and assessing personal property; moratorium; the assessment of bank stock in the district in which the bank is located; the compensation of assessors; the classification of moneys and credits.

TEXAS. Annual report of the comptroller of public accounts of the state of Texas. Showing the receipts and disbursements and other transactions of the department for the fiscal year ending August 31, 1918. 150 p.

He points out the great inequalities in assessment as between the various counties and recommends the appointment of a board of equalization. He also criticizes the gross receipts laws as not permitting sufficient revenue to be collected, and the state printing laws as wasting too much of the state's money.

UNITED STATES. Corporate earnings and government revenues. Sen. Doc. no. 259, 65 Cong., 2 Sess. Washington: Supt. Docs. 1918. 388 p.

VIRGINIA. Virginia tax laws. Corporation commission, Richmond, 1918. 246 p.

THE NATIONAL TAX ASSOCIATION

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

VOLUMES OF PROCEEDINGS. The volumes of proceedings, covering conferences held annually beginning in the year 1907, contain a large amount of practical up-to-date comprehensive information on all phases of taxation. The volumes are cloth-bound, fully indexed, and contain approximately 500 pages each.

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PERSONAL AND URGENT

The fiscal year closing June 30, finds us with unpaid dues standing against a considerable number of members. This oversight mars an otherwise successful year. This last urgent appeal is made in the hope that it will receive universal attention. The record is made so far as the officers can make it. The rest lies with each member. Hearty support and cooperation are the requisites for the continuance of the sustained and somewhat intense efforts of those who are seeking to maintain and enlarge the work and influence of the Association. LET'S ALL GET TOGETHER AND FINISH WITH A CLEAN SLATE.

ERRATA

We regret to find that some errors crept into the list of state taxing officials printed in the May BULLETIN. Doubtless other changes should be made and we hope to be advised of them and to be furnished with any additions which should be made so that the next print, to be made in the fall, will provide a complete mailing list for the interchange of reports, documents, and other communications by the various taxing officials.

The errors noted require a restatement as to certain states.

Montana	State Treasurer State Board of Equalization
New Jersey	State Board of Taxes and Assessments
North Dakota	State Tax Commissioner State Board of Equalization
Pennsylvania	Auditor General
Wyoming	State Board of Equalization

WANTED

From time to time we receive urgent requests from new members who wish to have complete sets of the *Proceedings* and the *Bulletin*, for volumes and numbers which are out of print. Doubtless many members, by a little investigation and search in their offices, may find that they have duplicates which they will be willing to dispose of to supply the wants of these interested members. They may also know of former members from whom the publications in question may be obtained. The secretary would be glad to know of such as are thus available. This applies particularly to volume 3 of the *Proceedings*, and to number 3 of volume I of the *Bulletin* (April 1916).

UNIVERSITY OF ILLINOIS JUN 2 1919

RETROSPECTIVE

The close of the year brings us to remark briefly upon the year's work. In many respects the situation has been difficult and unsatisfactory. Along with every other activity, our machinery has been strained. Abnormal conditions have confronted us. Public attention has been directed towards the great objective for which we have all, in one way or another, been striving. The daily duties have seemed small in comparison with the world events. The platitudes of taxation have fallen upon a public much concerned with problems of far larger moment.

And yet with all this, it is encouraging to be able to assure ourselves that we have progressed. Our membership today is larger by over one hundred than it was a year ago. We now have an active sustaining membership of 950, and this issue of the *Bulletin* will go to 1050 individuals. When we consider that a copy will go to each of something like 140 libraries, each holding a regular membership, the extent of our influence is further emphasized.

But the thought of prime importance which comes to the officers is that we are in a stronger position in every way than ever before and are thus equipped and ready to take our part in the difficult and trying adjustments immediately ahead. What we may be able to do rests with the members under the guidance of the officers. Whatever shall be our program for the coming year, we may rest assured that it will be possible to push it forward, backed by a reputation which will be fully recognized wherever fiscal matters shall be under consideration and supported by a responsible organization whose striking power is stronger than ever before and which is fully capable of carrying that program to a helpful conclusion.

It is fitting that the present Editor should take this occasion to express his deep appreciation of the encouragement and help extended by very many members through contributions to the pages of the *Bulletin*, kind words of encouragement and advice and by expressions of appreciation of what has been furnished, graciously overlooking its many obvious shortcomings. This generous support has naturally served to lighten the burdens of the work and has made possible whatever of benefit the *Bulletin* has been able to supply.

AN EXCEPTIONAL OPPORTUNITY

Members of the National Tax Association are plainly entitled to such special consideration as the Association may at any time be able to provide, looking to the accomplishment of its general purpose of promoting the careful, scientific examination of the questions involved in the improvement of tax legislation and administration.

We are pleased to announce an offer of especial interest to all who are concerned with the seemingly endless perplexities which arise in one form or another, in dealing with the relations of federal and state taxing powers. The important and timely articles by Professor Thomas Reed Powell which have been appearing in the *Harvard Law Review*, have already been commented upon in the *Bulletin* (see the issues of February, 1919, p. 133, and May, 1919, p. 222). Through the kindly interest of Professor Powell in our work, we have been able to make arrangements with the publishers to issue under our own auspices, a volume containing these articles, which will thus render easily available the wealth of research and the careful analyses of the limitations of state exercise of the taxing power which Professor Powell has presented in these articles. The text is fully amplified by copious references to the pertinent decisions of the supreme court, so that the volume will really be an effective digest of all the important cases bearing upon this subject.

The question is considered under two main heads: the taxes which are an interference with federal instrumentalities and those which are an interference with interstate commerce. These subjects are illustrated by separate treatment of the various possible kinds of taxes, showing the variations in the tests of constitutionality as displayed in the several phases in which they present themselves.

At no time in the development of constitutional law as it relates to taxation has there been seemingly greater confusion and hence greater need for constructive criticism and analysis such as Professor Powell furnishes in these notable articles.

The articles run through seven issues of the *Review*, aggregating approximately 300 pages. We plan to issue this volume at a nominal charge, in accordance with our general policy of disseminating informa-

tion on taxation, and with a view to emphasizing the value of our Association. The price has been fixed at $1.00 net, to members of the Association, and $2.00 to non-members. It will be necessary for members to place their orders at once because the number of copies available is limited. While we shall endeavor to give members the first chance to secure this book, prompt action is a necessity. The volume will be available in June. Address orders to the Secretary.

LEGISLATIVE NOTES

Naturally, with the conference coming in **Illinois,** we would wish to know something of the taxation plans in that state. Unfortunately, definite information does not seem to be available. Some time ago Mr. Sutherland kindly sent us some observations as to the possible course of legislation. Since then the legislature has convened, but very little of the plan has as yet materialized. The general program was outlined by Governor Lowden in his annual message to the legislature. It embraced the addition of a separate division in the recently created Department of Finance to carry out the functions of the ordinary state tax commission and to replace the present state board of equalization. We quote from Mr. Sutherland's notes the following:

"To most students of taxation it may appear off-hand that the subject of taxation is sufficiently important to constitute a distinct department. Illinois' governmental history, and the recent improvements achieved under Governor Lowden's leadership, however, explain why the administration is reported to prefer uniting the assessment feature with the general department of finance. When Governor Lowden was inaugurated the state business was carried on through more than one hundred and twenty-five distinct commissions and bureaus, wholly uncoordinated and with many duplications of effort. In the reorganization of government, effected by the general assembly two years ago, nine principle departments were created, each under a director, and all the governmental functions were placed under one or another of those departments. It is thought that, having destroyed one governmental wilderness and brought things to an orderly condition, the governor is now loath to start a new wilderness growing by creating even a single new commission, unrelated in control to any of the other departments. The raising of revenue is closely connected with the expenditure of public funds, and the logical place for the reorganized taxation machinery, it may be argued, is in the finance department."

The justification for the departure from the typical tax commission, thus explained, may doubtless be attributed to the success of the reorganization effected under the inspiration of Governor Lowden and through the energy of Director of Finance Omar H. Wright. A recognition of the situation and some description of the accomplishments were contained in the message of the Governor to the present legislature, from which we quote as follows:

"It seems to me almost providential that it should have been enacted into law before war actually came. * * * The same difficulties arose in the conduct of public business which vexed private business so much. There was necessarily much confusion. The cost of all supplies rose rapidly. Unless the more than 100 scattered agencies, which had existed theretofore, had been welded by the civil administrative code into a compact and coordinate government, anything like efficient state government, during these difficult times, would have been impossible. Illinois, through the greater elasticity and efficiency of her new form of government, was able to meet every emergency of the war without an extraordinary session of her legislature.

"The appropriations made by the last general assembly were based upon pre-war prices and conditions. And yet we will have completed the biennium without a deficiency in any department under the code, with the exception of the item of supplies for the charitable and penal institutions in the department of public welfare. * * *

"One of the departments created by the civil administrative code was the depart-

ment of finance. . . . It has prescribed forms for accounts and financial reports. It has supervised and examined the accounts and expenditures of the several departments. It has approved or disapproved all vouchers, bills, and claims of the several departments. It has required each department, before an appropriation for such department should become available for expenditures, to prepare and submit to the department of finance an estimate of the amount required for each activity to be carried on within such department."

Mr. Sutherland further says: "The governor points out in his statement that when he took office there was only $528.82 available cash in the general revenue fund, with many claims against the treasury for which warrants had not been issued; that on January 1, 1918, there was (net) in the same fund $4,734,316, and on January 1, 1919, there was (net) $12,901,744, which, the governor announced, it was the administration's intention to make cover the bulk of the expense of the state during the first six months of 1919 in order to 'avoid the unbusinesslike practise which has obtained at times in the past of using the taxes levied for the following year.'

"'All bills are now paid promptly,' concludes the fiscal report, 'and the credit of the state is thus greatly improved, enabling the state to secure better prices upon the commodities it has to purchase. We also are able to take advantage of all cash discounts, which in itself has resulted in a considerable saving.'

"That this is not all language and literature is evidenced by the fact that the state tax rate has been reduced from 90 cents in 1917 to 75 cents in the last year."

From Deputy Commissioner Locke of **Massachusetts,** some idea of the situation in that state is to be gathered, although here the proverbial moderation of the legislature is in evidence and very little actual progress has been made. The principal problems seem to be the devising of a new method for the distribution of the income tax and the construction of a corporation tax to take the place of the present chaotic franchise tax system. A recess committee of the legislature reported on both of these subjects and recommended that the income tax should be distributed on the basis of the state tax. This at once aroused the ire of the "favored" towns, where naturally the yield of the income tax was desired to be retained and which would be largely reduced by the system proposed. The representatives of these communities presented a bill which would distribute the tax to the cities and towns where the taxpayer resided; in case of trustees, to cities and towns where the beneficiaries resided; in the case of annuities, where the annuitants resided. By this plan the so-called "favored" towns would be benefited beyond all reason. It soon became evident that this latter plan could not be adopted in toto, and the proponents finally offered a substitute scheme by which the 6 per cent tax on intangibles should be returned to the source, but the one and one-half per cent tax on business income should be returned to the place where the business was carried on.

In the meantime another method was proposed whereby all the cities and towns which would lose from the amounts given in the temporary distribution, should be reimbursed up to the amount which they had received, while all the other cities and towns should be placed on the state tax basis. It is impossible to forecast at this time just what permanent method of distribution will be adopted. The committee has been flooded with figures showing how all of these four schemes would affect the different cities and towns of the commonwealth, it being necessary that the members should know what the financial reasons were with relation to each one of the four plans. The plan which was recently adopted in New York whereby the State of New York retains one-half of the tax and distributes the other half to the cities and towns on the basis of assessed real estate has favorably impressed certain members of the committee. It will be seen that this method is little different from the method that was proposed by the recess committee since the basis upon which the state tax is apportioned includes real estate and tangible personal property.

On the subject of the corporation tax, Mr. Locke advises that the committee recommended a franchise-income tax retaining the corporate excess part of the present law and adding an income tax as a supplementary tax. Certain interested people have taken the matter up and have been working

for some months on the details of this plan. Under the proposed bill, on domestic corporations the corporate excess is to be taxed at $3. per thousand and the income tax is to be 4 per cent of that part of the net income which is derived from business carried on within the commonwealth. The federal return is to be made use of but in addition the corporation is to make return of its gross business and its claim for all the ordinary deductions which are allowed under income taxes. As an analogous system for the foreign corporations, a tax of $3. is imposed upon the value of the capital stock employed by it within the commonwealth, the measure of the capital stock employed in the commonwealth to be such proportion of the value of the issued capital stock as the tangible assets, both real and personal, employed in any business within the commonwealth, bear to the total of such assets of the corporation, the supplementary income tax to be 4 per cent on the part of the net income derived from business carried on within the commonwealth.

It would seem that there is very little difference of opinion as to the fundamentals of these two bills. The adherents of the bills at the proposed rates may become opponents if the rates should be largely increased. Of course, it would be idle to say that there is no opposition to these bills. There is a large opposition, and whether, considering the opposition, it is possible to enact the bills, is a matter of conjecture. We have the usual number of corporations which believe in letting well enough alone, desiring to retain the present system and if it is imperfect smoothing out those imperfections. The committee has had weighty matters under consideration this year, and it looks as though before very long, a consensus of opinion would be had in the committee and some constructive legislation reported in consequence.

In **New Jersey,** State Tax Commissioner Jess advises that in view of the considerable revision of the tax law made in 1918 and particularly on account of the appointment this year of a commission to investigate the tax laws, radical changes in the laws were not considered necessary or advisable. The commission referred to is provided for by a joint resolution and consists of five persons who are directed "to fully investigate the operation and effect of the tax laws of this state and to recommend legislation essential to an equitable, just and adequate system of taxation."

The commission, which will probably report at the 1920 session, has organized with Commissioner Jess as chairman and the Secretary of the State Board of Taxes and Assessments as secretary. Speaker of the Assembly Pierson, who is a member of this Association, is a member of the commission.

The new provision for semi-annual payment of taxes is effective this year for the first time, as is the change in the fiscal year throughout the state, under which a uniform date has been provided for reports and payment of taxes.

State Librarian Dullard recently addressed the State Association of County Tax Boards, advocating a state income tax and a complete revision of the tax laws with a classification of personal property at different rates.

The "back kick" of the New York income tax is likely to be felt from New Jersey, if the rumblings and threats of the New Jersey commuters as recorded in the daily press, are any indication of future legislative action. It will be remembered that in the May issue, in discussing the New York income tax, we mentioned this situation, but of course could not describe the details. One source of irritation appears to arise from the fact that, while the New York tax on residents is 1 per cent up to $10,000, collection at source for the salaries of non-residents is at 2 per cent, regardless of amount, and in addition the non-resident is not given a personal exemption. Upon these unrelated circumstances the non-resident is able to make out quite a serious complaint.

From Commissioner Morgan of **Colorado** we learn that, while several tax bills were introduced and urged by the Commission, among them one to submit a constitutional amendment to remove the irritation now existing by reason of the superimposition of the state board of equalization upon the tax commission; another to provide four year terms for all county officers, including county assessors; and others to clarify present laws. None of these bills became laws, due, not to any opposition, but because they were displaced

by matters thought to be of greater importance.

At the election in November, the people adopted, by a substantial majority, a civil service amendment to the constitution which places the commission and all its members under the civil service. Mr. Morgan observes that the present members of the commission therefore appear to be "in for life."

From Professor Loeb we received a comprehensive description of the chaotic performances of the **Missouri** legislature which recently adjourned, and in commenting upon which, one of the newspapers spoke of it as a "triumph of peanut politics." We give Mr. Loeb's comments in full because of the general interest naturally felt in the results in a state where we had planned to hold our conference. It is possible to at least observe that we might have induced a better record.

Professor Loeb delicately omits emphasis upon the indirect but none the less effective disposition of our friends, the present members of the tax commission, whose salaries are not provided for in the annual appropriation measure, although provision was made for the pay and expenses of the subordinate officers of the commission.

Tax Legislation in Missouri

The tax legislation in Missouri during 1919 emphasized chiefly revenue considerations rather than the reform of existing evils in tax laws and their administration. While considerable additional revenue had accrued from the tax legislation of 1917, the ban placed on the brewing of beer and the pending prohibition of the sale and manufacture of all intoxicating liquors threatened to reduce the state revenue from these sources by more than $2,500,000 during the biennial period 1919-20. Governor Gardner, accordingly, recommended additional sources of revenue and the legislature made provision for increasing the taxes levied by most of the laws enacted in 1917.

1. The so called inspection fee on "soft drinks" was increased from one-half cent to two cents for each gallon of non-intoxicating beverages sold in the state.

2. The annual franchise tax upon corporations was increased from 3/40 to 1/10 of one per cent of the par value of the capital stock and surplus employed in Missouri.

3. The income tax rate was increased from one-half of one per cent to one per cent and the exemptions were reduced from $4000 for heads of families and $3000 for other persons to $2000 and $1000 respectively. Provision was made, however, for an additional exemption of $200 for each dependent child.

Another important change was the repeal of the section of the income law of 1917 which permitted a person to present receipts for state taxes on property in any year in payment of income taxes assessed against him during said year. As a result of this action the income tax becomes an addition to instead of a substitute for the property tax.

4. The rates of the inheritance tax were increased for all except direct heirs as follows:

In cases of transfers to brothers, sisters, uncles, aunts and descendants, from three to five per cent;

In cases of transfers to great uncles, great aunts and their descendants, from four to six per cent;

In cases of transfers to more distant relatives or strangers from five to seven per cent.

As the original law provided that the rates should progress according to the value of the inheritance beginning at double the normal rate in all amounts between $20,000 and $40,000 and extending to six times the normal rate on the excess above $400,000 in value it follows that a maximum of 42% may be levied upon amounts in excess of $400,000 going to distant collaterals or strangers.

The inheritance tax law was also amended so as to make the exemption for public, religious, charitable, or educational purposes apply to the original transfer as well as to cases in which the property descends from one trustee to another.

The Governor's recommendation for a mortgage recording tax law received the approval of the Senate but failed of passage in the House of Representatives.

The greatest struggle of the session had to do with the State Tax Commission provided by the Legislature in 1917. This commission undertook to assess property at full value, as required by law, and secured

cooperation from most of the local assessors. The Constitution gave final power of equalization to the ex-officio State Board of Equalization and three of the five members refused to approve the assessment of the State Tax Commission and adopted figures which did not differ materially from those approved the previous year. The Tax Commission followed its original policy in preparing the assessment for 1919. Considerable complaint, however, had arisen from the local assessing officials who were compelled to revise their books after the action of the State Board of Equalization.

When the Legislature met this year there was a general demand for the repeal of the tax commission law. This was not mainly due to opposition to full assessment but to the anomalous situation created by the action of the State Board of Equalization. As it was feared that the Legislature could not control the acts of this constitutional body the only alternative seemed to be the abolition of the tax commission. The situation was further complicated by politics, as the majority in each legislative chamber represented opposing political party interests. Both houses agreed in passing a bill repealing the tax commission act. The Senate passed a measure conferring certain of the tax commission's powers upon the State Board of Equalization and abolishing the requirement for assessment at full value. The House of Representatives refused to concur insisting upon assessment at full value with a reduction in the state tax rate. A dead-lock ensued on the closing day of the session when a compromise proposed by Governor Gardner was adopted.

The appointment of the three tax commissioners by the Governor in 1917 had not been confirmed by the Senate. The Governor agreed not to reappoint these men. The Legislature appropriated $30,000 to pay the expenses of the subordinate officials of the tax commission for the ensuing biennial period. No appropriation was made for the salaries of the tax commissioners but the Governor plans to have this provided in a deficiency appropriation in 1921. The Governor will veto the bill repealing the tax commission.

Hence the tax commission survives. The Governor will doubtless appoint new commissioners who will be able to work with the majority of the State Board of Equalization. It is probable that the approach to full assessments will be more gradual extending over a number of years. That there will be some significant increase in assessments is practically certain, as with state and local authorities levying maximum rates the revenues are inadequate particularly in school districts.

Secretary Burtless of **Michigan** advises that the only act of importance passed at the recent session was one making the three members of the board of state tax commissioners also members of the state board of equalization. Heretofore, there has been the awkward situation which exists in many other states, that the state taxing body which secures all the facts with respect to assessments throughout the state and is in position to equalize with full knowledge of the peculiar situations, is without power to do so but it is done by a temporary body consisting of state officials who meet specifically for that purpose. Under the new situation the three members of the state taxing board will constitute a majority of the state board of equalization, the other two members being the auditor general and the president of the state livestock sanitary commission.

From Secretary Cullen of the state board of equalization of **Wyoming,** somewhat more detail was learned of the changes which were mentioned in the April BULLETIN. It appears that the law which created the state board of equalization, abolished the office of tax commissioner (Ch. 35). The board is composed of three appointed members with terms of six years instead of being an ex-officio board made up of state officials, so that in reality it constitutes a modern tax commission. It is also a public service commission.

A constitutional amendment (Ch. 53) was adopted authorizing a special tax upon live stock for the purpose of providing for inspection. An act (Ch. 140) provides for the assessment and taxation of car companies, to be administered by the state board of equalization.

Chairman Sims of **Alabama** writes that the whole subject of taxation is in the hands of a recess committee of the legislature and that no plans have been formu-

lated. The legislature will reconvene on July 8th to resume its session.

Oddly enough, the experience of western **Canada** in flirting with single tax, appears not to have dismayed the eastern provinces. From Assessment Commissioner Forman of Ontario we learn that the provincial legislature this year passed an act (Bill 161) containing a section under which the municipal council of a city may, with the consent of the electors, assess dwellings on a graduated exemption as therein set forth. The result in Toronto, he says, will be the total exemption of $48,500,000.

He also calls attention to an act passed this year giving the city of Ottawa local option in the right to exempt, within a period of four years, all buildings and improvements, income and business assessments, each year reducing these assessments by 25 per cent, this being subject to approval by the tax payers qualified to vote. The Commissioner adds that "there has been a strong undercurrent of feeling favorable to the application of the so-called 'single tax system' notwithstanding the experience of our western Canada cities and experienced common sense."

From Director Asplund of the **New Mexico** Taxpayers' Association, we have received a copy of the income tax bill enacted by the recent legislature. It seems to contain a good many of the elements of difficulty which have appeared in other state income tax laws which follow the federal law without an appreciation of the difference in situation. The act applies to resident individuals and to domestic corporations and to any owner of a mine, oil or gas well, as to income from the same. The corporations are treated like individuals and made subject to graduated rates. The taxpayer may offset his income tax by presentation of a tax receipt for tax paid upon personal property. The yield goes entirely to the state for the support and maintenance of educational institutions.

From former director James, we learn that the New Mexico tax limit law was practically wiped out with its repeal as applied to both highways and schools, the reasons being in his judgment very interesting.

From Commissioner Plumley we have a detailed statement of acts in **Vermont** of general interest. These include acts with respect to the more effective collection of poll taxes; central supervision of collection; interest on over-due taxes; taxes on insurance companies; exemption of tax on Victory Loan bonds held by banks; taxation of deposits in trust companies and savings banks; corporation license tax; tax on inheritances and transfers; and poll tax on women voters.

From Commissioner Jackson of **Washington** we learn that the recent legislature passed an act defining the meaning of the terms "assessed valuation", "tax value", "property assessed", and "value", making them all mean the same thing when used in connection with the levy of taxes.

An act was passed providing that all property shall be assessed at 50 per cent instead of not to exceed 50 per cent as at present. A law was passed eliminating the $3.50 per day limit on salaries of deputy assessors and the restriction that they must be residents of the county,—this to provide for the employment of expert assistants to cruise timber or mineral lands.

The legislature of **Florida** has convened and is considering tax legislation. The Governor, in a message to the legislature dated May 8th, called attention to various measures designed to provide funds to meet the proposed appropriations. He expressed the thought that, in view of the burdensome nature of the present laws upon lands and other visible property, some other sources should be availed of. Among these he mentioned franchise, inheritance, and income taxes, being specially insistent upon a corporation franchise tax. He indicated a purpose to withhold approval of bills to carry out appropriations unless his suggestions for laws to provide funds from new sources should be adopted.

From Secretary Downing of the Taxpayers' Association we learn that very little support may be expected from the present legislature for the proposed constitutional amendment noted in the April Bulletin. Apparently he has been made aware of the pervasive and unfortunately effective influence of the educational people, a phenomenon which has often turned up as a check to the adoption of perfectly sound meas-

ures. There is a curious failure on the part of these interests to see the need for freedom in taxation and to recognize that in the long run it would not adversely affect their interests. Their insistence on the retention of existing rates and sources, which arises from a perfectly natural fear of reduction in appropriations for educational purposes, seems an extremely short-sighted policy for persons from whom the opposite course would naturally be expected. The situation here is a repetition of what has occurred in other states.

NOTES AND NEWS ITEMS

THE NEWEST STATE TAX ASSOCIATION

Under the energetic direction of former secretary Downing of the deposed state tax commission, an active state association has been started in Florida, with headquarters at Tampa. Vigorous prosecution of the demand for revision of the state tax laws is being conducted, through addresses by members of the association, newspaper articles and through the membership. We note liberal use of National Tax Association literature and reliance upon our recommendations. Mr. Downing, in sending remittance for membership, observes that "Were it not for the national association, the taxpayers who are willing to spend money for research and improved legislation in state and local taxation, would find it much more expensive and results less easily realized than with this institution to rely upon."

We are pleased to express our appreciation of these sentiments which are helpful and which serve to inspire us to proceed with renewed confidence. The original plan of the National Association was that it would form a means of coordinating and stimulating the efforts of such state associations as this latest Florida association.

Mr. Downing sends us a very helpful reference to a recent opinion of the Florida supreme court, which is likely to concentrate public opinion in a practical way upon the chaotic though not unusual operation of the tax laws in a state where constitutional limitations still exist and prevent rational and workable tax laws and their effective administration. The court in this case was dealing with the legal effect of unequal assessments and of discrimination as between individual taxpayers in the same class, and quotes the well-known language of Judge Taft in the Tennessee case, in which he so well brought out the essential principles of equity which ought to govern in the assessment of property and rejected the doctrine urged and which had at times been followed by the courts that when the law specifies full value as the rule, a taxpayer cannot receive relief even though discriminated against. His characterization of that doctrine will be remembered, that it is "to stick in the bark and to be blind to the substance of things. It is to sacrifice justice to an incident."

The court finds gross discrepancies in the assessment of property in the county under investigation and where the property in question was situated, and that the board of county commissioners deliberately, intentionally and arbitrarily sustained an assessment which they knew was unjust and unequal and discriminating, and that they had perpetrated a fraud upon the injured taxpayer. When the case is officially reported we hope to review it at length.

A BY-PRODUCT OF SEPARATION

California is usually pointed to as a state where the doctrine of separation, which was prevalent some years ago, has been given full sway. Its results have been heretofore analyzed and discussed by various persons (see particularly the discussions in volume nine of the Proceedings). One of the objectionable results predicted by the opponents of the system, appears to have been experienced here, as indicated by the following extract from a letter written by State Comptroller Chambers to State Senator Jones on March 11, 1919.

"Dual Tax System's Weakness

"While the dual system of taxation which has been in existence in California since 1911, whereby the state leaves general property to the counties and derives its

main revenue from the taxation of corporations, has worked remarkably well, yet, in my judgment, it has had a marked tendency to encourage the spending of money. The people are too far removed; so the responsibility of stewardship is lessened, and the state government has expended money accordingly. If the old ad valorem system of taxation of general property had continued, there is no one familiar with the trend of events who would admit for a moment, in my opinion, that state expenditures today would be what they are. It is true that there has been a decided demand on the part of the people for the progressive legislation that now marks our statutes; yet if the tax burden had fallen upon them directly and unmistakably, as it would have done under the general property tax system, we would not have advanced nearly so rapidly as we have done. The cost of government has been camouflaged through the taxation of corporations, the people not realizing that, after all, the ultimate consumer pays the debt."

A COMMUNICATION

MILWAUKEE, WIS., MAY 17, 1919.

MR. A. E. HOLCOMB, Editor,
The Bulletin of the National Tax Association, New York.

Dear Sir:

Your article entitled "Side lights on the Model Tax System Committee Report" in the April edition of the National Tax Association is very interesting. I quite agree with Professor Bullock that a diversified system will prove to be the only just solution of a model system of taxation in this or any other country. The system should, however, not be too diversified so that it would fail of adoption by the various states of the Union. The greater the diversity, the more difficult to obtain the endorsement of the system throughout the land.

Why not confine it to a property tax on Real Estate and all other tangible property, excepting Merchant's and Manufacturer's Stock? The reason why Merchant's and Manufacturer's Stock is excepted is because it is practically impossible to do justice to this class of property by that method. That fact has been frequently alluded to by some of our best writers and advocates of tax reform. In lieu of the property tax on Merchant's and Manufacturer's Stock adopt an occupation tax on business, based upon the amount of business transacted during the previous fiscal year. By adjusting this occupation tax to an income tax, which is to take the place of a tax on intangible property (stocks, bonds, etc.) and which at the same time will be the leveling or adjusting tax between the Merchants and Manufacturers who make little or no profit, and those who make greater profits by reason of a more frequent turnover or otherwise, a fair method of taxation for Merchant's and Manufacturer's Stock will be obtained.

We would then have

1st. The property tax to apply on all property except Merchant's and Manufacturer's Stock and intangible property.
2nd. The occupation tax on Merchant's and Manufacturer's Stock based upon the gross sales of the previous fiscal year and
3rd. The income tax to apply on net profits.

The property tax rate and the occupation tax rate to be the same and to be determined from year to year as the needs and requirements of the municipality vary.—The income tax rate to be a fixed rate.

This was discussed in the paper presented by me and published in the Proceedings of the Eleventh National Conference of the National Tax Association at Atlanta, Ga.

In addition to the discussion in that paper, I have presented the plan individually to a number of persons who are engaged in a study of taxation problems. While many have said the plan had merit and have at least professed considerable interest in it, none have pointed out any fault in it. This has encouraged me to believe that it may be a solution of a very vexatious problem. If the plan has faults, no one would like better than I to have them pointed out. If it is substantially correct, it should be seriously considered before the annual meeting of the Association at which it is hoped a model system will be adopted. I enclose herewith a copy of the paper referred to for your consideration.

Yours very truly,

E. H. BODDEN,
Tax Com'r.

INVESTIGATION OF THE BRITISH INCOME AND EXCESS PROFITS TAXES BY A ROYAL COMMISSION

[A Royal Commission has been appointed in England to investigate the income and excess profits tax laws of the United Kingdom and the Birmingham Chamber of Commerce has adopted a method of sending out questionnaires in order to obtain evidence for submission to this commission. A series of twenty-two questions has been circulated among the members of the Chamber of Commerce asking for their opinions on suggested amendments to the law. A statement of the questions, and of the answers thereto, made by the editors of the London *Accountant*, which appeared in the issue for May 3, 1919, is reproduced for the benefit of our readers. Most of the questions are applicable to our tax and some of them indicate very interesting comparisons between the American and the British statutes.—Ed.]

(1) *Reduction of exemption limit to £104.*

In principle, this cannot be opposed, but a difficulty arises as to whether or not the expense of administration would not be excessive. The suggested limit would be comparable with a pre-war limit of about £50 or £60.

(2) *Effect of a high income-tax rate on industry.*

This question can be well illustrated by a reference to the Excess Profits Duty. Had this Duty not existed it is obvious that selling prices *could* have been reduced, so that, in normal competitive times, a high rate of taxation increases production costs and thus hampers foreign trade.

(3) *Amendments of the form of returns.*

This would automatically follow a general simplification of the tax, but the continued introduction of minor equitable amendments creates further complication. A great part of the matter on the return form is superfluous, and a simple two-page statement could convey all the information that is essential. It is quite unnecessary to set out voluminous details that only confuse, and, if the present practice were necessary, it could analogically be contended that each taxpayer should be served with a copy of the Acts!

(4) *Separate assessment of partners.*

This should clearly be introduced and would be a simple matter in working. The liability of the firm having been determined, the individual partners' liabilities could readily be fixed and separate demand made, so that one partner would be quite ignorant of another's financial position.

(5) *Production of Balance Sheets.*

Objection to this fell through considerably on the introduction of the Excess Profits Duty, which, of course, could not be worked without Balance Sheets. For income tax they are obviously a very valuable guide to correct liability, and it would be difficult to formulate any opposition that could be characterized as other than trivial. The objection to perusal by the Local Commissioners is overcome by assessment by the Special Commissioners, but it is only in very exceptional cases, where there is an appeal, that the Local Commissioners see the accounts.

(6) *Should the Surveyor be required to accept accounts certified by a Chartered or Incorporated Accountant as conclusive, subject to a right to raise queries on methods of treatment of certain items?*

This, in actual fact, would mean that the expenses charged by the accountant would have to be allowed without question, a course which would obviously prevent any consistency of allowance. Nothing is gained by fetters that are not guards against pure inquisitiveness. The system standing at present is admitted generally, by the majority of qualified accountants, to be reasonable and what an accountant would himself require if he were the person entrusted with the determination of liability.

(7) *Sufficiency of depreciation and obsolescence allowances.*

The law at present is deficient in that it does not provide for depreciation of *all* assets, nor for wasting assets. The latter will be given by the Commission and the former should clearly be extended. The existing law allows the *full* depreciation of machinery and plant, but the practice does not conform to this. A remedy could be found by leaving the normal rates to be determined, for particular classes of trade, by the Excess Profits Duty Board of Referees. Exceptional depreciation could be dealt with separately on the merits of each case.

(8) *Depreciation of freehold and leasehold buildings.*

This is covered by (7).

(9) *Depreciation of patents.*

This also is covered by (7).

(10) *Should depreciation be based on cost or written down value?*

This depends upon whether actual depreciation is constant or diminishing, and the same rule does not apply to all items. If the *full* depreciation is allowed, the question is not important, and the existing basis of written-down value gives an earlier allowance.

(11) *Should income tax be levied on actual income instead of statutory income, and should profits left in the business be charged?*

"Actual" income would have to be defined, and it would then become statutory income, otherwise the charges deducted would be inconsistent and at the discretion of the taxpayer. It would be inequitable not to charge profits left in the business, as the trader who was compelled, by the smallness of his profits, to draw the whole would be badly treated in a comparative sense, as also would be a trader who withdrew profits and invested them in another sphere of industry.

(12) *The three years' average.*

This should clearly be abolished. The system has no advantages to a trader as it relieves him when he makes large profits—and is then able to pay—and charges him when his profits fall. The basis should be that of the preceding year, and a trader would then know, on making up his accounts, that the profit shown would be liable.

(13) *Co-operative Societies.*

These societies ought equitably to pay tax.

(14) *Discount on prepayment of income tax.*

It is not just that one trader should pay in January and another in April, and the position of the early payer should be protected. The discount already allowed to a person who pays before 1st January is a correct proceeding.

(15) *Should agreed assessments be conclusive unless the Surveyor has actual knowledge of or good grounds for believing that assessments have been inadequate?*

This is destroyed by the qualifications which, if introduced, would, in actual fact, render the provision inoperative. An endeavor to reopen an assessment must proceed from *some* grounds, and the proving of "good" grounds would not be a very difficult matter. The question refers to wilful suppression or obvious error resulting in inadequacy, but this qualification is not really material.

(16) *Abolition of assessors and collection from the office of Surveyor of Taxes.*

The first part of this is very sound. Assessors are an antiquated and useless institution which would not be introduced in any sensible modern income tax. This also applies to collectors, and tax should be paid to a strictly Government Department—not necessarily to the Surveyor of Taxes. A very considerable decrease in the cost of administration would also result.

(17) *Is the present right of appeal to the General and Special Commissioners satisfactory?*

It is difficult to determine a better course, as there must be some body to which appeal can be made, and an amendment would mean the substitution of a different body. Objections could be raised to the form of any body, and an honorary body such as the Board of Referees could not deal with a multitude of appeals. Local bodies of the same constitution would involve the objections now applicable to the Local Commissioners.

(18) *Discontinuance of collection at the source.*

The abolition of deduction at the source would remove many anomalies and avoid the complications arising from repayment

claims or allowance of the applicable relief where the proper rate is less than that deducted.

(19) *Should the incomes of husband and wife be aggregated?*

The objections to the aggregation do not bear investigation. If separate assessments were permitted it would only be equitable, in a case where a wife had no income, to allow a division of the husband's income between the husband and wife.

(20) *Should the previous year's income-tax assessments be conclusive for super-tax even though they were erroneous?*

This is vague. If it means that super-tax liability should be a distinct calculation it would give a double appeal, which would be unnecessary, but if it relates to a *palpable* error in the income-tax assessment, that can only be ignored for income-tax owing to the time limit for appeal having passed. The error should certainly not be perpetuated in the super-tax.

(21) *Should life assurance premiums be allowable for super-tax or abolished for income-tax?*

The premiums should not be allowed for either tax, as savings in other directions are not exempted.

(22) *Is the present method of collection of manual workers' tax from employers satisfactory?*

This apparently refers only to the cases where the employer has undertaken to deduct the tax from the wages, which is purely a voluntary undertaking.

LUXURY TAXES

E. L. BOGART
University of Illinois

In his message to Congress of May 20, 1919, President Wilson urged the repeal, among other taxation reforms, of the taxes upon retail sales. These form a new source of revenue which has been developed by the war, and of which, consequently, a brief résumé is of interest at the present time.[1] France, Great Britain, and the United States each developed a luxury tax, though the choice of objects, technique, and administration differed materially in the three countries. Curiously enough, the tax was in no case introduced until towards the very end of the war, and in fact in the case of the United States, not until some months after the signing of the armistice. There had existed for some time in each of these countries, however, a strong demand for such a tax for the sake not merely of raising additional revenue, but more especially of repressing undesirable and extravagant expenditure. It was felt that the consumption of non-essentials should be penalized.

France was the first country to introduce the luxury tax in the budget of 1918. When the bill dealing with this tax was introduced into the Chamber by the Minister of Finance, it proposed a three-fold classification. The object of the law, according to the Minister, was "to attack manifestations of wealth, and not instruments of labor; it taxes enjoyment, but does not wish to paralyze effort." The classification proposed grouped commodities, according to their luxurious character, as follows:

(1) Obvious luxuries: in this group were enumerated photographs, jewelry, antiques, sporting games, mechanical pianos, motor cars, billiard tables, perfumes, sculptures, yachts, silk underwear, liqueurs, watches, etc.

(2) General articles such as clothing, which becomes a luxury when the price exceeds a certain sum: in this group the tax was imposed if the price exceeded: $2 on imitation jewelry, children's undergarments, scissors, yard lace, fans, and imitation bronze; $4 on gaiters, book-binding, traveling clocks; $8 on pleasure dogs; $10 on boots, tablecloths, tea and coffee service; $16 on children's suits; $20 on men's suits; $50 on women's costumes; $100 on horses; $500 on safes and motor-cycles.

The bill as finally passed in March was

[1] A fuller account of war taxation will be found in a study by the writer entitled *The Direct and Indirect Costs of the Great World War*, to be published shortly by the Carnegie Endowment for International Peace.

a double-barreled affair which taxed (1) every payment of a sum exceeding $30 representing the retail sale or consumption of a luxury commodity at the rate of 20 centimes per 100 francs or fraction; (2) there was also a tax of 10 per cent upon the price paid for any object or article of merchandise which was designated by law as an article of luxury, and for expenditures made in certain establishments such as hotels and restaurants which were classed as "establishments de luxe." Both these taxes were to go into effect on April 1, 1918.

It was not long before wholesale protests began to be forwarded to the government against the 10 per cent tax on articles of luxury. It was objected to upon the ground that prices were already high enough; that it was unfair in distribution, since it applied only to prices in excess of certain fixed minimums. Difficulties too, in the way of practical administration developed, and trade in the articles falling under the scope of the tax fell off enormously. It was urged that in lieu of this, a tax of 2 per cent on the turnover be substituted. By November the so-called luxury tax had become so unpopular that its radical modification, if not its abolition, was regarded as imperative. After a trial of over six months, it produced only about one-third of the expected revenue, and proved equally unpopular both with the purchasers and merchants. In many cases the stores themselves paid the tax in order not to lose trade. It was also urged as an objection that many of the articles classified as luxuries had in reality come to be regarded as necessities, and finally, that the bookkeeping involved constituted a serious cost to the merchant. As a result of these protests a bill was introduced into the Chamber proposing to replace the luxury tax by a 2 per cent tax on the total turnover. In order to ascertain this, every merchant was required to keep books showing his exact daily receipts.

The general theory of the luxury tax was very unpopular in France. It was stated that the government was uncertain whether it was repressing undesirable expenditure, or seeking to increase its revenue. The two purposes being self-contradictory, both could not be secured by the same enactment; in France the former result seems to have been attained at the expense of the latter, but it was not obtained without considerable cost in irritation and dissatisfaction on the part of the people—an intangible, though sometimes heavy, price for a government to pay. In the next session of the Assembly the luxury tax was thrown out by the Chamber, but was finally restored after the Senate had voted to retain it. Modifications were made in the tax to meet some of the more serious objections — for instance, the tax was made to apply only on the excess of price over the exempt minimum.

England was the second country to introduce the luxury tax. It was included by Chancellor Law in the budget submitted in April, 1918, for the fiscal year 1918-19. The House of Commons voted that the tax should be referred to a committee which should work out the details and that upon its report the tax should be put into effect. The luxury tax was to be collected by means of a stamp duty at the rate of 2d in the shilling (about 15 per cent) on a considerable list of articles if the price was sufficiently high to warrant their being classed as luxuries. This committee made its report to the Chancellor in August.[1] It divided articles into two groups: (1) Schedule A, on which the tax was to be paid whatever the price, and which included the following articles: jewelry, fans, perfumes, liveries, pictures, sculptures, liquors, clothes made of silk or furs or trimmed with furs, rents for fishing and shooting rights, riding and hunting clothes, pianos and musical instruments, billiard tables, yachts and motor cars; (2) Schedule B included a list of articles on which the tax was to be paid when the price exceeded certain specified minimums — such were meals and accommodations at clubs, hotels and lodgings; shoes, hats, furniture, thoroughbred horses, dogs, bicycles, and all articles for personal use. The tax was a well-meant effort to take toll of those who spent money on superfluities or unnecessarily costly articles, but the committee was criticized by the *Economist*, on the ground that it never really made up its mind whether its object was "to get revenue or check expenditure." Owing to the newness of the tax, the committee did not venture to estimate the expected yield.

The luxury tax in the United States is contained in the ninth title of the act of

[1] *Chronicle*, August 17, 1918, p. 630.

February 24, 1919. This includes a miscellaneous assortment of excise taxes which had been imposed under previous acts, but which was now greatly enlarged by the addition of a number of non-essentials and luxuries. Under the head of "excise" taxes the following articles were taxed at rates varying for the most part from 3 to 10 per cent of the price: automobiles, motorcycles, motor accessories, pianos and musical instruments, sporting goods, chewing gum, cameras, photo films, candy, firearms, hunting knives, swords and similar articles, electric fans, thermos bottles, cigarette holders, humidors, slot machines, liveries, riding habits and boots, articles made of fur, yachts, motor boats and canoes, toilet soaps and powders. In addition to these, sumptuary taxes were laid on a large number of luxuries or high-priced articles. A tax of 10 per cent was imposed on prices in excess of specified minimums in the case of carpets, rugs, picture frames, trunks, valises, ladies' purses, lamps, umbrellas, fans, smoking jackets, waistcoats, hats, footwear, neckwear, silk stockings, men's shirts, nightgowns, and kimonos. And finally, a small group of articles evidently regarded as pure luxuries was taxed a certain percentage irrespective of their price, this group including jewelry, precious stones, watches, moving picture films, perfumes, toilet compounds and medicinal compounds.

It has been suggested that under the heading "excise" taxes are included articles used by men, and under the head "luxury" taxes are included the so-called non-essentials consumed almost exclusively by women.

It is evident from the irritation and dissatisfaction occasioned by these taxes in each of the three countries named, and by the prompt recommendation of the President of the United States for repeal of a tax in operation only twenty days, that the luxury tax cannot be regarded either as a well-devised or a permanent part of our fiscal machinery.

Had they been imposed early in the war, they might have been effective in checking extravagance and the consumption of non-essentials; a better method of imposition and collection of the tax might have avoided some of the objection on the part of consumers and the expense to which retailers were put in collecting a tax which in many cases was trivial. It may safely be predicted, now that the war is over, that in any reorganization of the tax systems of the three countries named, the luxury tax will be one of the first to be repealed.

OBSERVATIONS ON THE CORPORATION INCOME TAX

Extracts from Article by JUDSON G. ROSEBUSH, of Appleton, Wis., entitled "A Productivity Theory of Federal Taxation," December, 1918

"Next let us take up the matter of income taxation. This form of tax, as already suggested, should only be levied after inheritance taxation as above outlined has proven insufficient for the reasonable needs of the state. As a matter of fact, in times of peace there would be no income tax, but in times of war it would be used as an emergency measure such as Sir Robert Peel intended. (Seligman, 'Income Tax,' p. 130.) As between income taxation of the individual and income taxation of the corporation, the latter should only be used if the personal income tax proved inadequate, for the reason that the income of the corporation is, generally speaking, used in a more social way than that of the individual. More and more, the income of individuals is composed of dividends from corporations, and such presumptively are paid only when the corporation does not need the money so declared for expansion or extensions. That is to say, corporate dividends are supposedly such moneys as can be released from the capital fund of the country without loss of productivity. From the standpoint of the corporation they are sums which can safely be "earmarked" for use in purchasing necessities, comforts, and luxuries, by the individual. Hence the obvious propriety of taxing them first in the form of individual income taxes before touching corporation income at all.

Finally, the same course of reasoning would suggest that corporate income taxes

should only be levied as a last resort for the National Treasury, and in times of great national emergency, and even then only on the theory that some real sacrifice on the part of the productive life of the nation was essential to achieve definite and accepted war ends.

While at such times war-profit taxes are entirly proper, meaning thereby taxes directly arising from war activities, excess-profits taxes are even then of more than questionable wisdom, meaning thereby taxes in excess of what Congress deems a normal and fair return on capital.

In concluding this part of the analysis it should be noted, finally, that the argument of taxes based upon faculty finds its weakest practical application in connection with income taxes on corporations, for the obvious reason that such taxation is based on the corporate ability *per se*, rather than the ability of the individual stockholders thereof. (Cf. Seligman, 'Income Tax,' pp. 37-8.) In effect, this fact constantly violates the premise of personal faculty, for the income tax hits the poor stockholder without real faculty as well as the wealthy stockholder with abundant faculty, both being members of the same corporation; moreover, the corporation composed of a few wealthy men is taxed in the same way as other corporations composed of middle class stockholders, again in violation of the real faculty principle. In view of the fact that American corporations are steadily increasing their list of stockholders, and that some of them have stockholders numbered by the tens of thousand, drawn from all walks of life, it is manifest that we have here a very real and fundamental defect in the administration of income taxation as applied to corporations. Obviously, therefore, such taxation if predicated upon ability, should be levied last of all.

It is only when a corporation pays out a dividend to its stockholders that its essentially private character appears. It is therefore only in connection with the dividends received by individuals that taxation should ordinarily be applied, because in taxing corporations as such either upon income or profits, the state is fettering social service; worse than that, to tax such income or profits on the graduated basis is to penalize corporations for their social service and in geometrical ratio to such service.

It is, of course, quite proper that the state should aim to keep the corporation in good form at all times, and functioning without discrimination; but having done that, the state should then so direct statute law as to render the maximum aid to corporate activity. When, as at the present time, Congress must look to every available source of revenue, the taxation of the corporation, and especially the taxation of its war profits becomes proper, but even then the act should be performed with a due appreciation of its reaction upon the industrial life of the nation, and without the superficiality that characterized the recent report of the Federal Trade Commission upon the profits of our great corporations."

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

LICENSES—CLASSIFICATION—DISCRIMINATION. — The United States Supreme Court has just held invalid a privilege tax sought to be collected under a statute of Tennessee (Acts, 1909, Ch. 479) which provides a tax of $100 upon a person engaged in the taxed occupation, whose chief office is outside the state and of $25 upon one whose chief office is inside the state. The person involved was a citizen and resident of Alabama, engaged in railroad construction work in Tennessee. A tax of $100 was imposed which he declined to pay. The state court (138 Tenn. 145) held that there was no discrimination, as a person having his chief office in the state, whether a citizen or not, was taxed $100, while one whose chief office was outside the state was taxed $25, also whether a citizen or not. The supreme court declined to agree to this argument, holding that as a practical matter, ordinarily the individual will have his chief office in the state of his residence and that therefore such a statute necessarily produces discrimination, contrary to section 2 of Art. IV of the federal Constitution.

The court further observes that the loca-

tion of a chief office furnishes no adequate basis for classification and is arbitrary and unreasonable.—*Chalker et al. v. Birm. & N. W. Ry. Co. et al.*, U. S. Sup. Ct., Apr. 21, 1919.

Inheritance Tax — Non-Resident Aliens—Treaties.—The inheritance tax law of Iowa provides for a tax at the rate of 5 per cent upon estates passing to collaterals but where the property passes to non-resident aliens the rate is fixed at 20 per cent. This provision was brought in question in a case involving a transfer to citizens of Sweden. It was held that the statute must yield to the terms of the treaty existing at the time of the death of the intestate, which was construed to preclude any higher rate of tax upon residents of that country than that imposed upon residents of the state.—*Brown* v. *Peterson*, 170 N. W. 444.

Banks. — A recent Nebraska case, besides construing the provisions of the amendment of 1915 (Ch. 108) to the act prescribing the method of taxing bank shares (Sec. 6343 Rev. St. 1913) contains an interesting discussion of the subject of double taxation which is often claimed to exist in connection with the tax on shares. The court holds that in taxing the shares, mortgage securities owned by the bank, upon which the mortgagor has agreed to pay the tax, are not required to be deducted in arriving at the value of the total capital stock. Prior to the amendment in question, mortgages were required to be deducted, being made real estate by statute. The discussion alluded to is elaborated by reason of an extensive argument in the dissenting opinion. — *Nemaha Co. Bank* v. *County Board of Equalization*, 170 N. W. 500.

Situs — Intangible Property of a Minor. — In a recent Virginia case the question was presented of the proper situs for taxation of intangible property of a minor, where the statute does not fix the situs but requires it to be listed by the guardian. The guardian was a non-resident and it was urged that either the situs was at the residence of the guardian or that, there being no situs fixed, the omission was fatal to the taxing power of the state as to the property in question. The court rejected both contentions, holding that the general rule of situs at the residence of the owner, applies to the property of minors no less than to others.—*Taylor* v. *Commonwealth*, 98 S. E. 5.

Uniformity—Mortgage Registration Tax. — The attempt in Tennessee to circumvent the uniformity provisions of the Tennessee constitution (Sec. 28, Art. 2) as to mortgages, by the imposition of a registration tax (Ch. 70, Acts 1917) has met disaster at the hands of the supreme court of the state. Little difficulty was apparently felt by the court in reaching its conclusion and the case is chiefly interesting for its helpful reference to decisions in other jurisdictions, construing such taxes under different constitutional provisions. The states in which registration taxes have been upheld and the cases cited are: Michigan, 137 N. W. 122; Minnesota, 116 N. W. 572; New York, 100 N. E. 404; Virginia, 73 S. E. 446; Alabama, 66 South. 169. The Kansas decision to the contrary is also cited (149 Pac. 977). The court suggests that in Michigan, Minnesota and "doubtless in New York" the tax is sustained as a property tax, while in Alabama and Virginia it is sanctioned as a privilege tax. It was conceded in the instant case that the tax could not be upheld as a property tax and the exemption from ad valorem taxation, granted by the statute, was held fatal to its validity if considered as a privilege tax, citing *Keith* v. *Funding Board*, 155 S. W. 142.—*State* v. *American Trust Co.*, 208 S. W. 611.

Valuation of Franchise—Operating Expenses. — In computing the valuation of an exclusive ferry franchise for taxation under the Kentucky statute, by a capitalization of net income, it was held proper to include in operating expenses a reasonable amount as salary of the owner and operator of the ferry, who devoted his entire time to its operation.—*Commonwealth* v. *Kottmyer*, 208 S. W. 823.

Equality. — In a recent Iowa case the court reaffirms previous decisions and holds in line with the prevailing judicial view that though the value fixed on land for taxation is below its market value, it may be excessive, if the valuation, as compared with other lands in the immediate vicinity, similarly situated and used, is inequitable.—

Hanson v. *Town of La Claire*, 170 N. W. 747.

PUBLIC PURPOSE.—General interest attaches to the experiment in municipal operation undertaken by the state of Massachusetts. By chapter 159, Special Acts of 1918, the operation of the Boston Elevated Railway was taken over by the Commonwealth upon a rental to the owning corporation of a stipulated rate of return on its stock. The intention was to raise the rates of fare sufficiently to pay the costs of operation but a bill, introduced in the present legislature, has for its purpose the abandonment of this original plan and a fixing of a low fare, admittedly insufficient to pay the cost of operation, the balance to be made up by payments out of the treasury of the Commonwealth which, in turn, are to be assessed upon the cities and towns in which the lines are operated. The constitutionality of this act was submitted by the legislature, to the supreme court for an advisory opinion and that court has rendered its decision upholding its constitutionality.

The question was admittedly a novel one, being in effect whether the state could carry such persons as desired to ride on the Boston Elevated Railway at less than cost and could assess the rest of the cost upon the public by taxation, such taxation being levied in order that dividends might be paid to the stockholders of the public service corporation in question.

The court held that the operation was justified as a public use and hence the taxation in question would be constitutional as involving a public purpose.—*In re Opinion of Justices*, 122 N. E. 763.

BANKS — "ASSESSMENT."—A recent Iowa case involved the question of whether the fixing of a valuation or base for the purpose of computing the tax on bank shares was an "assessment" which required the exercise of judgment, or whether it was a mere mathematical calculation by the use of factors designated in the statute itself. The court held the latter to be the fact and that hence the action of the county auditor in increasing the valuation of the shares was a "correction" such as he was authorized to make and was not an exercise of judgment in opposition to such exercise by the assessor.—*First Nat. Bank* v. *Hayes*, 171 N. W. 715.

MANDAMUS—LIMITATIONS.—The effect of a tax limit provision in connection with a mandamus proceeding to compel the levying of a tax to pay a judgment, was passed upon in a recent Missouri case. Plaintiff had recovered judgment in a large amount upon bonds issued by the county in 1870, in connection with the construction of a railroad. He thereafter secured a writ commanding the county authorities to levy a tax to pay off the bonds. This writ was not obeyed and in each of the succeeding two years, similar writs were obtained, with like result. Action was brought declaring one of the county officials in contempt and he was committed. Upon appeal one of the objections was that at the time the bonds were issued a general law was in force limiting the tax which might be levied for railroad purposes to 30 per cent of the subscription of the county, whereas the writ which was alleged to have been disobeyed, commanded a levy in excess of that limit, it being the accumulation of three years' neglect to make a levy.

The court held, following and quoting from the decision in *East St. Louis* v. *Amy*, 120 U. S. 600, and citing *Hicks* v. *Cleveland*, 106 Fed. 459 and *Padgett* v. *Post*, 106 Fed. 600, that the accumulation of the debt was caused by the neglect of the inhabitants and that there was no reason why the court did not have power to order a single levy to meet the entire judgment. The question of an oppressive tax rate was one for the court to determine.—*Evans* v. *Yost*, 255 Fed. 726.

STATE INCOME TAXES—"NET INCOME."—A question of considerable importance to corporations in New York, Connecticut, Massachusetts, and probably elsewhere, is whether, in computing the state income tax, under a statute which bases that tax upon the net income as determined for the purpose of the federal tax, it is permissible to deduct from the gross income, the federal income taxes paid and the federal excess profits tax payable in the year in question. This question has been decided adversely to the corporations by the Appellate Division of the Supreme Court of New York.

The New York statute designates the tax as a "franchise" tax, on account of certain constitutional provisions making it impossible to administer a property tax through state officers, and provides that it "shall be based upon the entire net income

of such corporation for such fiscal or calendar year as returned to the United States Treasury Department, subject to any correction thereof for fraud, evasion or errors, ascertained by the state tax commission."

Under this language, the court held unanimously that the tax should be imposed upon the "entire net income" without allowance for the excess profits credit and for federal income taxes paid, as the latter, while proper expenses in reaching net income, are expressly excluded by the federal statute and hence must be excluded for the state tax, under the language quoted. The court gives little consideration to the claim for allowance on account of the excess profits taxes, upon the ground that the state is not interested in what the federal government allows, by way of credit, in reaching its taxes. Such allowance does not affect the construction of "entire net income."—*People ex rel. Barcalo Mfg. Co.* v. *Knapp*, 175 N. Y. Supp. 337.

Assessment. Basis of—Admissions—Real Estate.—The valuation of the real estate of a "gentleman farmer" often involves difficulties, due to the absence of many of the elements of value under actual conditions existing in connection with such property. There is naturally much of this difficulty in towns contiguous to New York City.

In a recent proceeding to review an assessment upon a farm of this character, the testimony of the opposing experts was conflicting and that of the plaintiff's experts was not conclusive in the opinion of the court, which based its judgment for reversal of the order of the trial court reducing the assessment, upon two facts which it found were undisputed. First, the complainants had, shortly before the pending proceeding, filed an application in another proceeding involving the fixing of the transfer tax on the property, giving its value as $275,000, as against the value fixed by the lower court one year later, of $191,250. The evidence in the transfer tax proceeding was excluded by the trial court, which was held error.

The second point was that the evidence showed an expenditure by the owner of $200,000 for improvements, the original cost of the farm being $110,200. It was urged that these expenditures for improvements should be disregarded under such circumstances upon the theory that, as a general rule, improvements do not add value to the extent of their cost. This the court held untrue, but that the contrary was true, that improvements do add to the value at least to the extent of their cost, except in the unusual cases of "folly" estates, instances of which being referred to as described in *Matter of City of New York*, 91 N. E. 278, and *Matter of Histon*, 155 N. Y. Supp. 1114. The order directing a reduction in the assessment was reversed and a new trial ordered.—*People* v. *Sutton*, 174 N. Y. Supp. 547.

Licenses—Classification. — Under a statute of Indiana (Acts 1915, p. 674) a license in an admittedly prohibitory sum was required of all persons engaged in the redemption of trading stamps either in cash or in articles not the product of their own manufacture, while all others might engage in such business without license. The constitutionality of this act was brought in question as violating section 23 of the Bill of Rights of the state constitution. A preliminary question was as to whether the business in question was one for the conduct of which a regulatory license fee could be imposed. This was resolved in the affirmative, following *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342.

Upon the main question, the court found the act invalid, as the classification between those redeeming trading stamps in goods of their own manufacture and those redeeming such stamps in goods manufactured by others, lacked any reasonable basis and was thus violative of the essential principle upon which classification rests, citing *Bedford Quarries Co.* v. *Bough*, 80 N. E. 529. —*Sperry & Hutchinson Co.* v. *State*, 122 N. E. 584.

Exemptions—Manufacturing Establishments.—A claim for a particular exemption from taxation cannot be sustained, unless it is shown to be within the spirit as well as the letter of the law, and the party asserting the exemption must show that the power to tax in the particular case has been clearly relinquished.

The owner of a manufacturing plant, who had leased it to another and who derived his revenue from the rent received under the lease, was held not entitled to

exemption from taxation under a city ordinance passed pursuant to a state statute giving authority therefor, which exempted such plants "actually employed or used in the business of manufacturing" in said city. It was held that the exemption extended only to those actually engaged in manufacturing and that the lessor in question was not within the ordinance.—*Felippe A. Breadbent Mantel Co.* v. *Mayor &c.*, 106 Atl. 250.

City License — Telegraph Poles — Equal Protection. — The United States Supreme Court has affirmed a judgment of the Arkansas Supreme Court (131 Ark. 306) sustaining a license tax on the poles of a telegraph company erected within the city of Little Rock including those erected on the right-of-way of a railroad and also including those within the city limits as extended after the date of the franchise ordinance authorizing the erection. The case was decided by the state court upon the theory of a license tax and not as a payment under the franchise contract and the federal court accepted this theory. The company urged violation of the due process, equal protection and commerce clauses of the federal constitution, all of which claims were rejected.

That the exaction of a reasonable tax upon the maintenance of poles and wires does not impose an unwarranted burden upon interstate commerce or upon an agency of the federal government, was held thoroughly settled by previous decisions, which were cited, the most recent being *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. These cases were held to establish that a city may impose such taxes not merely for the occupancy of the streets but by way of compensation for the cost of supervision and inspection and that therefore the fact that the tax was imposed upon poles standing upon the railroad right-of-way, did not condemn the ordinance, particularly as the railroad crossed a street car line and several highways, requiring supervision at such crossings and there was no support in the record for the contention that the tax was unreasonable even though applied to poles on private property as well as on the highways.

There was no denial of equal protection claimed to arise because other telegraph companies, taxed under a general ordinance antedating the one in question, were not taxed for poles on railroad right-of-way, the court suggesting that this went no farther than to show that the general ordinance, which in terms applied to all poles, had not been enforced in the same manner as was proposed in the instant case, there being no offer to show arbitrary and intentionally unfair discrimination as in *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 374, and it being possible that the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on city streets, with a view to the enforcement of the general ordinance against the other companies upon all poles.

The absence was noted of any offer to show that the circumstances of the other lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws.—*Mackay Telegraph & Cable Co.* v. *City of Little Rock*, U. S. Sup. Ct., May 19, 1919.

Income Tax—Stock Dividends as Income.—On May 19, the United States Supreme Court ordered the case of *Macomber* v. *Eisner* restored to the docket for argument, thus postponing a decision of this important question until fall. (See Bulletin, IV, 180.)

Exemptions — Rights of Equitable Owner. — In a Virginia case it was held that, under a statute providing for relief in assessment cases to be given to "any person assessed with taxes * * * aggrieved by any such assessment", the holder of the equitable title to property which was assessed in the name of his trustee could apply for and receive relief, the court observing that the taxes, if properly assessed, would constitute a lien upon his property to be paid out of his funds, while if improperly assessed, they would constitute a cloud upon his title, which he would have the right to have removed. Land belonging to an educational institution but not being used for school purposes nor adjoining property on which a school building was located, was held not exempt from taxation under section 183 of the Constitution, exempting property exclusively devoted to educational purposes. It was also held that an electric light and power plant erected upon the land for the purpose of

supplying the school buildings with light and power may be taxed, where it is used to supply a neighboring town with light, to the extent that the amount so used could be separated from the remainder used exclusively for school purposes. — *Commonwealth* v. *Smallwood Memorial Institution*, 97 S. E. 805.

SPECIAL DISTRICTS—ROLLING STOCK—INTANGIBLE ASSETS. — A navigation district in Texas, constituting a taxing district under authority of the legislature and coterminus with a county, sought to collect taxes for district purposes on the value of the tangible assets, rolling stock and intangible assets of a railroad as assessed by the state tax board and apportioned to the county for the purposes of local taxation. The court denied the claim, holding that the power of the district extended only to the taxation of property "within said district"; that, while railroad rolling stock and its intangible assets have no actual situs in any particular county or district, and while it is within the lawful power of the legislature to determine where such property may be taxed, and while the railroad company has no constitutional right to have its intangible property taxed only at its place of domicile, in this case it did not appear that the legislature had determined these questions and had actually delegated to the navigation district a right to tax this class of property, which is without an actual situs and has only such situs as is given by the state law.—*State* v. *Houston & T. C. Ry. Co.*, 209 S. W. 820.

LICENSES—TELEGRAPH COMPANY.—An ordinance of the city of Decatur, Alabama, levying a tax on the intrastate business of the defendant telegraph company within the corporate limits of the city, was sustained. Held:

1. That inasmuch as the ordinance merely levied a tax on intrastate business and expressly excepted from its operation interstate and government business, the claim that the ordinance interfered with interstate or government business could not be sustained; nor could the defendant claim immunity because of the acceptance by it of the provisions of the Post Roads Act.

2. That the court could not declare the tax unreasonable and void on the demurrer to the plea, since although courts would in proper cases declare void any ordinance of a municipal corporation levying a tax upon a harmless business or occupation that was prohibitive and destructive of the business, a flagrant case of excessive and oppressive abuse of the taxing power must be shown before the courts will exercise such power.

3. That the reasonableness or unreasonableness of such a tax could not be determined by the volume of business of a single corporation as there might be competition, or negligence, or other considerations affecting the extent of the business which could not be charged to the taxing power; and furthermore, on a demurrer, the burden being upon the defendant to overturn the presumption that the ordinance was reasonable, it was necessary for the pleas to aver that the defendant at this particular office conducted its business with reasonable care and diligence, and to this end made and collected for all such service the usual and customary charges.

4. That while the court would take judicial notice of the minimum charge made by telegraph companies in the state between given points, this rule would not be extended so as to require them to take judicial notice of the volume of business conducted by the telegraph company at a particular telegraph office or that the telegraph company and its agents had frugally conducted the business of the office or that a particular agent had acted with reasonable diligence in respect thereto.

Bricken, J., dissented on the ground that the tax imposed was a privilege tax, not authorized under the police power, and not a license and was therefore not authorized by the laws of the state.—*Western Union Telegraph Co.* v. *City of Decatur*, 81 So. 199.

In a companion case to the *Western Union* case, involving the same ordinance, the following additional questions were determined:

1. That § 1339 of the Code, providing for the levy of a license tax on persons, firms or corporations having an office or transacting business in the city or town imposing the license, was not unconstitutional as undertaking to delegate to municipal corporations authority to tax interstate commerce, since the manifest intent and purpose was to limit the authority of the municipality to the levying of a tax on

the intrastate business conducted through an office within the corporate limits of the municipality. The statute being susceptible of this construction, which would free it of constitutional objection, such construction must be adopted rather than one which would render it unconstitutional and void.

2. That there were such differences between the business of a telegraph company and that of a traction company that the fact that traction companies were not included in the same class as telegraph companies did not constitute an arbitrary classification, within the inhibition of the law.—*Postal Telegraph-Cable Co.* v. *City of Decatur*, 81 So. 204.

Taxation of Incomes of Nonresident Aliens. — If an alien nonresident owns stocks, bonds and mortgages, secured upon property in the United States or payable by persons or corporations there domiciled; and if the income therefrom is collected for and remitted to such nonresident by an agent domiciled in the United States; and if the agent has physical possession of the certificates of stock, the bonds and the mortgages; such income is subject to an income tax under the act of October 3, 1913. — *De Ganay* v. *Lederer*, U. S. Sup. Ct., June 9, 1919 (Bull. II, 266).

Domestic Corporation—Situs of Intangible Property.—What was evidently a test case under the laws of North Dakota for the taxation of domestic corporations, has been decided in support of the law. The case presented the bald situation of a domestic corporation which, as a matter of fact, maintained its entire business in another state and owned no property whatever in the state of its domicile. Was such a corporation taxable under a statute requiring a valuation of its entire stock, the deduction of its tangible property, leaving the excess taxable as intangible property, at its home office under the heading of "stocks and bonds"? (Comp. Laws 1913, sec. 2110.) Thus there was the contention by the state that the theoretical situs of the net worth of the concern over its tangible property, was at its mystical home office where it apparently had in fact nothing. The court held squarely in support of the validity of the assessment as made, relying largely upon the decision of the Minnesota court in passing upon a similar statute from which the one in question was copied (*State* v. *Duluth Gas & Water Co.*, 78 N. W. 1032) and upon expressions in *Hawley* v. *Malden*, 232 U. S. 1, 12. A vigorous and emphatic dissent was noted based upon the proposition that as the company, as a matter of fact, owned nothing whatever in the county, the assessment was clearly invalid. —*Grand Forks County* v. *Cream of Wheat Company*, 170 N. W. 863.

License—Automobiles.—The business of leasing or hiring driverless automobiles to the general public is of a public nature and it is within the power of a city to subject that business to reasonable regulation by a license tax. The business is not the private use by an individual of his property over which the police power cannot be exercised.—*City of San Antonio* v. *Besteiro*, 209 S. W. 472.

Equalization. — *Barnes* v. *Watson*, 98 S. E. (Ga.) 500, decided February 24, 1919, was a suit to enjoin the collection of a tax. The question raised therein was whether the State Tax Equalization Act was unconstitutional in that it provided for arbitration in case a taxpayer was dissatisfied with the assessment of the valuation of his property by the Board of Tax Assessors, and in prohibiting an appeal from the finding of the arbitrators.

The court held that its prior decision in *Vestel* v. *Edwards*, 143 Georgia 368, was controlling. In the latter case it was declared that a statute having for its object the equalization of taxation by means of a fair assessment of property returned, and providing for notice to taxpayers whose returns have been increased, and for the selection of arbitrators, is not repugnant to the due process clause of the Constitution of the United States or of the State, nor does it deprive the taxpayer of the equal protection of the laws. This decision appears to be in harmony with the uniform current of judicial decisions.—[A. J. H.]

Child Labor Profits Tax. — A move has been made to test the constitutionality of the section of the new Revenue Act which provides for a tax of 10 per cent on the net profits of products manufactured by child labor. On May 2, 1919, in the recent case of *Eugene T. Johnston* v. *The*

Atherton Mills (U. S. District Court, Western Dist. of No. Carolina), Federal Judge Boyd held the statute unconstitutional, and granted a motion to make permanent a temporary injunction against its enforcement. The case has not yet been officially reported, and it seems to appear from the final order that the suit to declare the tax invalid was not instituted by a factory owner, but was brought in behalf of a child laborer to prevent his discharge from the service, or the reduction of his hours of labor. The issue in this form was apparently narrowed down to a question of the power of the federal government to regulate these matters directly or indirectly. The Court, overruling objection to its want of jurisdiction, held that the legislation encroached upon the State's powers.

Unquestionably an appeal will be taken to bring the case for review before the United States Supreme Court which will test the Act in the light of its former decisions on tax and other matters. These precedents were analyzed in an article in this BULLETIN, April 1919, pp. 167-169. See also note on *United States* v. *Doremus* (249 U. S. 86), *ibid.*, p. 183.

FOREIGN CORPORATION FRANCHISE TAX. —When complainant, a foreign manufacturing company, qualified to do business in the state, the privilege tax then required by law and paid by it, was a fixed amount for all corporations. The law was later changed so that the tax to be paid was graduated according to the capital stock of each corporation. Complainant paid the tax assessed against it under the new law under protest, and sued to recover the same. The recovery was denied, the court holding that the state had a right to change its method of taxing foreign corporations doing business therein from a flat privilege tax to one based on their capitalization, and the secretary of state properly construed the law as changed, to apply to complainant, requiring it to pay the difference between the new tax and the amount formerly paid by it, despite the fact that it had paid the full amount required by law, when it first entered the state, since this constituted merely a license to go into the state for the purpose of doing business; that the privilege for which the tax was assessed was the actual continuation of business in the state for which a privilege tax might be imposed and changed from time to time thereafter, depending upon the capital actually used in the business in the state, if the legislature so provides.—*Menger Box Co.* v. *Stevens*, 210 S. W. 635.

CAPITAL STOCK — SURPLUS—TREASURY STOCK. — In a case of interest mainly to New York corporations, interpreting one phase of the so-called "capital stock" tax, the supreme court at special term, held that the company was entitled to the statutory deduction up to 10 per cent of the surplus, as against the claim that no such deduction was permissible because, by reason of its ownership of exempt property, its *taxable* assets were less than its capital stock; following *People* v. *Federal Terra Cotta Co.*, N. Y. L. J., Aug. 5, 1918.

It was further held that treasury stock of this company which had been donated to it by the stockholders and was held by it, did not constitute assets or capital taxable under the act; that the term "capital stock" is synonymous with "capital" and does not mean paper shares but the property of the company "possessed in cash or invested in securities or real estate" (126 N. Y. 433) and cannot apply to shares of the company which represent nothing which neither increase or decrease the assets.—*Hinds, Hayden & Co.* v. *Purdy*, N. Y. L. J., Apr. 3, 1919.

INHERITANCE TAX AS A PENALTY TAX —CLASSIFICATION. — We have heretofore noted the litigation in New York as to the validity of the penalty inheritance tax enacted in 1917 (Ch. 700) providing a special tax of 5 per cent on the transfer of securities found in a decedent's estate upon which neither the optional registration tax nor the ordinary personal property tax had been paid during the lifetime of the decedent. (See BULLETIN, IV, pp. 60, 131). The county surrogate and the appellate court held the tax unconstitutional as being a classification without reasonable basis and as casting upon the transferee an arbitrary burden depending upon the mere whim of the decedent, in the nature of a punishment for the misdeeds of an ancestor.

The highest court of the state, on May 20, reversed the judgment of the appellate court and in doing so, rendered an opinion which, for its clarifying discussion of the fundamental bases of constitutional classi-

fication in taxation and its logical analysis of the underlying considerations involved, may well be considered of classic importance. So much so that the reviewer contemplates publication of the opinion in full in a subsequent issue of the BULLETIN.

Space forbids anything but the merest outline of this decision which will naturally be reassuring in those states like Connecticut (Gen. St. § 1190) and Louisiana, where similar provisions exist aimed at the securing of taxes from intangible property laid by way of inheritance taxes upon such property which has not borne its fair proportion of property tax prior to the inheritance.

The basis of the decision rests mainly in the court's conclusion as to the real basis of an inheritance tax; that it is an imposition on the right to inherit which it observes is not a natural right but one within the power of a state to limit at will and consequently to grant upon condition. Thus viewed, the question of classification arises, in view of the claim of lack of reasonable basis in the case at issue. Having reached its conclusion as to the fundamental basis of an inheritance tax, the matter of classification is held to rest largely in the discretion of the legislature and to greatly narrow the jurisdiction of courts. Following this view, it is held that the court can hardly say that there is lack of reason in a classification which places in one class property which has not been taxed locally where such fact can only, as is the case under the laws of New York, be discovered after the death of the owner. "The matter at least permits of argument and is not so capricious and whimsical as to be purely arbitrary. It has in it at least an effort for the equalization of taxation and the adjustment of the burdens of government." The selection of such property for inheritance tax is within the powers of the legislature.

A collateral question, of considerable interest in New York, was raised by the claim that as the property was made subject to a state registration tax and thereby removed from local assessment, this was a violation of the so-called "home rule" provision of the state constitution, local assessors being deprived of their constitutional right to assess this property. The court discusses this point in an interesting manner, suggesting considerations which have an important bearing upon possible classifications, heretofore deemed of doubtful validity. As to this, the court holds that the mere withdrawal of property from local assessment will not necessarily produce unconstitutionality so long as no attempt is made to deprive local officials of substantially all their power and there is no substantial impairment of local functions and no attempt to evade the constitutional provisions. It instances the withdrawal of mortgages; the long list of exempt property and the franchises of corporations when it was recognized that certain conditions or the nature of this property, resulted in its escape from taxation which justified the legislature in providing means for its effective taxation. So here, it argues, a large amount of property could not be reached for assessment by the local authorities. There was no means of determining who held such securities. The surrogates courts bore witness to the inability to equalize the burdens and reach all property. To remedy this condition, the registration tax was imposed which laid a flat tax upon such investments as might otherwise go untaxed. The imposition of the tax under such circumstances was not an attempt to evade the "home rule" provisions and was not passed with the intent to interfere with the taxing powers of the local authorities and was not a substantial change in the duties of assessors.

Full citation of authority is given on the various points above referred to, references to which will be found helpful by those involved in the consideration of the general subject of classification and the nature of inheritance taxes. The conclusion was that the estate should be assessed under the section in question (sec. 221-b of the Tax Law) upon that amount of personalty coming within the Investment Law (Tax Law, Art. XV) which was not assessed by the local authorities and for that beyond such as had not been so assessed, upon which the registration tax had not been paid. That the question was a close one is indicated by the fact that the court stood four to three in favor of sustaining the tax. The state comptroller is to be congratulated upon the final success of his persistent efforts against heavy odds. — *In the matter of Watson's Estate*, N. Y. L. J., May 28, 1919.

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TO MEMBERS

As will be seen, the editorship of the BULLETIN continues in the hands of the Secretary and Treasurer, who, furthermore, was re-elected at the Chicago conference. His assent to continue the work was given not without much misgiving, due not only to a feeling of inability, by training and experience, to carry it on as it should be done, but also to the fact that it involves a very material expenditure of time and effort in the midst of the exacting requirements of his personal and professional duties. The situation appeared as usual to require a sacrifice which he accepts only with the thought that thereby the work of the Association may be carried on as heretofore, at least until conditions generally improve, when it is hoped that someone may be inspired to succeed him. It seems appropriate to make these observations and to thus indicate the more or less temporary tenure of the office and to serve notice upon the members that the Association will require their united and concerted effort.

The condition of the Association, while it continues satisfactory, is, as may be expected, not free from the uncertainties and difficulties which exist in other lines of activity, and which are naturally more emphasized in a voluntary Association of this character. All costs of every nature are greatly increased and there is widespread and well-founded reason for retrenchment on the part of every one. This tendency towards economy, curiously, displays itself most emphatically in connection with associations of this character and seems absent in the attitude of the public towards expenditures of a more personal character. The repeated admonitions of the leaders of thought from the President down, that the only effective means of overcoming the wastes of the war and of restoring economic soundness, is through increased effort and the abolition of useless expenditures, seem to fall on deaf ears, and there appears to be a riot of extravagance and an alarming tendency to decrease productive effort.

The progress of this Association was never more necessary than now, and if the members recognize this and are willing to put up with the necessary shortcomings in management and editorship, the editor and secretary feels it incumbent upon him to do his part in the work.

There is no purpose to increase the annual dues or the price of the publications, even in spite of the increasing costs. These dues, with such moderate accumulations as

we have been able to lay aside, are deemed to be sufficient to carry us through the period of difficulty which lies before us.

On the other hand, there is a plain duty resting upon each member to help, if we are to maintain our position. This duty consists of supporting the officers in their work by making extra efforts to secure new members and contributing to the Bulletin, either by personal communication or by calling the attention of the editor to such addresses and papers as come to their attention.

Needless to say, the payment of dues on the part of the members is a most important matter. We are continually confronted with the necessity of sending bills for such dues. This involves expenditure of time and money which may be obviated if the members will themselves anticipate the matter by voluntarily making remittance.

THE TWELFTH CONFERENCE

The Twelfth Conference, which was held in Chicago in June, turned out to be the most successful one that has been held in many years. This was shown by the extent of the attendance, the character of the papers presented, and the interest shown in the discussions. Forty-two states and two Canadian provinces were represented—a record in this respect. We were favored with attendance by Governor McKelvie of Nebraska and by Minister-of-Finance Langley of Saskatchewan.

The program, as announced in the May Bulletin with the changes later made and printed in the final program, was followed with few breaks. We were disappointed that Mayor Mahoney of Newport, R. I., did not attend and that thus his discussion of bank taxation and his paper on the inheritance tax were omitted. His new duties prevented his participation. Senator Vaughan of Arkansas, while present, did not find it possible to fill his assignment. Professor Gephart was also unable to be present. We hope to print parts of his paper in early issues of the Bulletin. Another paper covering a topic of immediate interest was not presented. Mr. Hoyt, who was to speak on tax and debt limitation laws, was unavoidably absent and was unable to prepare a paper. We hope to have a contribution on the subject from him for the Bulletin.

These omissions, however, had their compensations. We were able to make space for a very instructive and interesting address by former tax commissioner Steele of North Dakota, who explained at length and to the evident interest of the delegates, the recent legislation in that state, including a description of the laws enacted in accordance with the program of the Non-Partisan League. Another address which we were able to include, was by Mr. Henry M. Powell, the author of the work on the New York income tax. He made some very helpful and instructive remarks in connection with this subject.

There was an opportunity to provide for round-table discussions at various points which were productive of no little warm debate. Much of the interest and effectiveness of these discussions was due to the helpful observations of our former secretary, Dr. Adams. Coming to us after his activities as a representative of the federal government, he was of course the center of attack from many angles. As usual, however, he met all arguments successfully and gave us a great many interesting suggestions on the subject of federal taxation and was otherwise most helpful.

A great deal of interest centered in the report of the model tax committee which was presented by Professor Bullock. There was almost absolute approval of this report on the part of the delegates and the expressions with respect to it were very complimentary.

A tentative report of the committee on mines was submitted by Chairman Howe. The thought which dominated a large part of the discussion was that of the need of cooperation between federal and state authorities in connection with the administration of tax laws. This matter was the subject of heated debate which, at one point, threatened a division of formal opinion. The final outcome was most happily brought about through a resolution suggested by Dr. Adams, which appears below. Chairman Thomas of the Louisiana Board of Affairs took a leading part in the discussion of this matter and here, as at other points at the conference, his participation was interesting and helpful.

The conference was presided over by Judge Armson, the accomplished tax commissioner of Minnesota. The addresses of welcome were made by Judge Miller of

Chicago, acting on behalf of the Mayor, and by Harry H. Merrick for the Chicago Association of Commerce. Governor Lowden of Illinois being then in the midst of the urgent pressure of the concluding hours of the Illinois legislature, was unable to be present. The response on behalf of the Association to the address of welcome was made by Chairman Zander of the Arizona tax commission, who directed our attention to the methods of taxation adopted by the ancient Greeks.

The consensus of opinion among the delegates was that this conference, while called suddenly and while held under somewhat adverse conditions due to postponements and the inability to cover details adequately, was a success.

RESOLUTIONS OF THE CONFERENCE

The resolutions adopted were, as usual, limited in number, consistent with the established and wise policy of refraining from going on record in a formal way until the Association is prepared to do so after full investigation and consideration, and with the united support of its members. Aside from the usual vote of thanks to the various individuals and organizations in Chicago and the state of Illinois who contributed to the success of the conference, the following resolutions were adopted:

"*Resolved*, That the National Tax Association be asked to appoint a committee on tax exemptions.

"*Resolved*, That the committee on inheritance taxation be continued with such additional members as the president may appoint and with power to act subject to the approval of the executive committee.

"*Resolved*, That the conference extend to the chairman and members of the committee on a model system of state and local taxation a vote of thanks and wishes to express to them its appreciation of their efforts in preparing the report of the committee for the consideration of the conference.

"*Whereas*, The conference learns with deep regret that impaired eyesight is responsible for the non-attendance of Allen Ripley Foote, Esquire, the honored founder and first president of the National Tax Association, and as Mr. Foote holds the unique record of having participated in each one of the eleven conferences held up to this time: Therefore be it

"*Resolved*, That the delegates of this conference take occasion to extend to Mr. Foote fraternal greetings and to make formal record of their hope that his health may soon be completely restored and that his present absence may prove to be but a temporary interruption in his long series of attendances.

"*Whereas*, There should exist the closest cooperation and mutual helpfulness between the taxing authorities of the federal and the various state governments, in the interest of uniform, fair and just assessments: Therefore be it

"*Resolved*, That the conference request the executive committee of the National Tax Association to take such steps as may be necessary and expedient looking towards cooperation and interchange of information between state and federal officials charged with the administration of substantially similar taxes, under due safeguards against general publicity."

THE NEW OFFICERS

The election of officers brought out a distinct desire for the renomination of Professor Bullock for President of the Association. This, however, he absolutely refused to consider. The conference therefore was able to bestow its highest honor upon Judge Haugen of Wisconsin, a member who has endeared himself to them through long years of interest in the work of the Association. They were equally desirous of registering their appreciation of the steady, consistent helpfulness of Governor Bliss of Rhode Island, by naming him Vice-President.

As before indicated, the offices of Secretary and Treasurer were combined and Mr. Holcomb was continued in such offices.

The vacancies in the executive committee due to the expiration of the terms of office of Messrs. Bailey of Utah, Bliss of Rhode Island, and Lesesne of Maryland, were filled by the election of Tax Commissioner Jess of New Jersey, Senator Vaughan of Arkansas, and John Edgerton, executive assistant of the state board of equalization of Montana.

PROVISION FOR FUTURE WORK

The executive committee held sessions during the conference at which future activities were discussed. It was thought that much good could be accomplished through the appointment of committees on various topics. This was doubtless suggested because of the success of the model tax committee. The committee work discussed and which will receive future consideration in the discretion of the officers, is as follows: committee on inheritance tax; committee on budgetary procedure; committee on exemptions and committee on codification of the tax laws. It was decided to continue the model tax committee, giving it power to proceed with the work outlined in the preliminary report. The committee on mines was also continued.

VOLUME TWELVE

The secretary is proceeding now as rapidly as possible with the preparation of the volume covering the proceedings of the Chicago conference. He finds, as was to be expected under present conditions, that there is likely to be even more than the usual delay. At the present time it appears that the volume should be in the hands of the members some time in the early part of December. The secretary, having been privileged to read the papers in preparing them for publication, can assure members that their unusual character will compensate in considerable measure for the delay, for which he is in part responsible.

1920 CONFERENCE

The selection of the place for the next conference was, as usual, not acted upon at Chicago, although urgent invitations were extended. Mr. Bailey of Utah repeated his oft-expressed desire that a conference be held at Salt Lake City, while Samuel Lord of Minnesota presented the claims of Minneapolis. Further invitations have come from the chambers of commerce or other authorities of many cities, including: Cleveland, Ohio; Asbury Park, N. J.; Los Angeles, California; Asheville, N. C.; Macon, Georgia; Saratoga Springs, N. Y.; Winnipeg, Canada; etc. The executive committee felt that it would be inadvisable to hold the conference until 1920 so that there will be ample time for full consideration of these various claims.

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Sworn and subscribed before me this 8th day of April, 1919. CHAS. E. LONG.
[SEAL] Notary Public.
(My commission expires Jan. 21, 1923.)

MEMBERSHIP NOTES

Mr. D. E. Felt of Chicago is giving others the benefit of his long experience as an employer and of his observations of conditions in Europe in a series of pamphlets. The latest to come to our attention is entitled "Industry drawing men off farms, basis of high cost of living—wage-workers themselves pay in long run."

The Ohio Taxpayers' League, George L. Gugle, Manager, Columbus, Ohio, is conducting a campaign in the interest of the constitutional amendment to permit classification. Its leaflets contain short, snappy paragraphs designed to present the significant facts.

Plans are progressing for the 9th annual conference of the New England State Tax Officials' Association which is announced to be held at Boston, December 4-6. The secretary, Edward P. Tobie, clerk of the Rhode Island commission, has issued a preliminary program covering a wide variety of subjects.

Dr. T. S. Adams, who has been engaged for the past two years in Washington and who was largely concerned with the drafting of the revenue act of 1918 and later became chairman of the Advisory Tax Board, returns to Yale University with the abolition of that board. He is announced

for a course on the public finance of war and reconstruction at the New School for Social Research in New York City, to be given this fall. This course will cover the general field of public expenditures, revenues, and indebtedness, with special attention to the principles of federal taxation and to proposed amendments to the existing law. Emphasis will be laid on the technical problems of the income and excess profits taxes. The course is designed not only for academic students but for the business man desirous of being informed of the principles of taxation and for the accountant and lawyer who are concerned in advising clients.

Mr. Charles V. Galloway, referred to in the local press as "the last democrat in the State House" and as refuting the old saying that "Democrats never resign", has at last succumbed and declines to continue in service longer at the meager salary provided. Mr. Galloway states in a published interview: "I have delivered nearly eleven good years of my very best services to the state of Oregon for $2500 a year. The legislature refused to increase the salary and I have concluded to deliver no more at the price." Mr. Galloway served for five years as a member of the executive committee of this Association and is now a member of the committee on a model tax system. Mr. Galloway leaves to take a position in a Portland bank and he will surely carry with him the best wishes of all who have been so fortunate as to come into personal contact with him.

Mr. Harley L. Lutz, editor of our department of *Recent Publications*, is now engaged in assisting the Ohio legislative committee in its investigation of the possibility of an income tax which may be suggested if the classification amendment is adopted. In connection with this work, Mr. Lutz visited various states where income taxes are in force, including Massachusetts, New York and Wisconsin. The report of this committee, when made, ought to constitute an important addition to the literature on the subject.

Douglas Sutherland, who has stood foremost at all times for the redemption of Illinois from the restrictions of its constitution, is actively engaged in pressing anew the pertinent arguments for reform. Many will remember his effective pamphlet issued in 1916 entitled "Apace with Progress", in which almost the entire expert opinion of the country was summarized. In a series of pamphlets just inaugurated under the caption "Constitutional convention series", Study number 2, entitled "Taxation and public finance", he sets forth in Part I the evils of the Illinois tax system, past and present; proposed variations; constitutional tax provisions of other states; and nation-wide opinion, gathered from many sources. It supplements the comprehensive pamphlet above mentioned and brings the situation down to date.

Richard A. Harvey, of Washington, D. C., an acknowledged expert on federal tax matters, appears as a member of the faculty of the Georgetown University Law School, lecturing on the interpretation of foreign and domestic commerce legislation. He is also tax editor of the Federal Trade Information Service and Bankers Information Service, issued by the Publicity Corporation of Washington, D. C.

L. D. Woodworth, secretary of the New York State Tax Association and for some time director of the Allied Real Estate Interests of New York City, has resigned to become secretary of the Savings Bank Section of the American Bankers Association, with headquarters in New York City.

W. S. Reed has been elected treasurer of the Emergency Fleet Corporation of the U. S. Shipping Board, with headquarters in Washington.

Charles A. Plumley, for many years commissioner of taxes of Vermont, has resigned and has taken a position as head of the tax department of the Firestone Tire & Rubber Company of Akron, Ohio. It will be remembered that Mr. Plumley was sought to be removed by the Governor but that the legislature refused to acquiesce in this program. Mr. Plumley is succeeded in the office by Mr. John M. Avery, a member of this Association and formerly director of the Vermont legislative reference bureau. He has attended our conferences in the past.

One activity which the treasurer and editor takes great pleasure in recording, is that of Mr. Lessing Rosenthal of Chicago, who has again emphasized his kindly interest in the Association by sending the names of twenty-one new members, accompanied by checks for their dues. Mr. Rosenthal was asked by the treasurer to tell us at Chicago how he accomplished such

results, similar lists of new members having been supplied by him before, until the total number of members secured through his personal solicitation has totaled over eighty in two years. He complied in a brief address which will appear in the volume of Proceedings, and reprints will be distributed to the members as an inspiration to them to follow his example. Those of us who had not before had the pleasure of meeting Mr. Rosenthal could easily realize, upon doing so, the reasons for his success in our behalf.

Judge Leser of the Maryland tax commission has been elected President of the influential City Club of Baltimore, which has embarked upon a comprehensive program of work in the interest of reform in various lines of civic activity.

As noted elsewhere in the BULLETIN under Legislation, Alabama has stepped into line with the establishment of an appointive tax commission to take the place of the state board of equalization. We have not as yet been advised of its personnel.

George E. Wallace, a member of the former state tax commission of North Dakota which was abolished in the extensive legislation of the Non-Partisan League of that state, remains virtually in the same capacity as tax commissioner under the new state board of equalization.

The deaths of the chairmen of two state tax commissions have occurred within the last year. These are: Robert D. Alexander, chairman of the Ohio tax commission, who died September 20, 1918; and A. P. Gorman, Jr., chairman of the Maryland tax commission, who died September 4th of this year.

LEGISLATIVE NOTES

From Senator Thombs of **Maine** we learn that the only change of general interest in the tax laws of that state to persons outside that state, made at the last session, was in the matter of the taxation of bank deposits drawing interest. Chapter 4 of the Public Laws of 1919 provides the usual reciprocal arrangement for exemption for residents where such exemption is granted by other states.

A bill for the taxation of intangibles was introduced, had its hearing, was adversely reported, and this report accepted in both branches.

A resolution was adopted creating a taxation commission to consider the whole matter of taxation in the state and report its recommendations to the next legislature. This commission consists of Senators Thombs and Davies, Representatives Pike, Maher, and Wilson. It has already entered upon its work and two of its members, Thombs and Pike, attended the sessions of the National Tax Association at Chicago. It has the hearty support and assistance of Governor Milliken, who is much interested in tax reform matters.

Chief Clerk Tobie of the **Rhode Island** Commission writes of the doings of the last legislative session. The bill establishing a uniform date for assessment of local taxes by the various municipalities was the most important of those passed. Heretofore each city and town fixed its own assessment date and assessments were being made practically through the whole year. The new act, which goes into effect in 1921, will fix June 15th (or if Sunday, June 16th) at 12 o'clock noon as the time to which all local valuations are to be referred. It was not attempted to limit the municipalities in the matter of the certification of their assessments within any given period of time or to fix a uniform date for the payment of taxes on the theory that if too much was tried, nothing would be accomplished. A uniform date for the payment of taxes may come later on. Towns which desire to change their financial town meeting dates, where such dates are now fixed by special acts, or to make any other adjustments in their local finances which require legislative action, will be able to apply to the General Assembly for the necessary legislation in 1920 and get themselves adjusted to the new condition before the act goes into effect on January 1, 1921.

This is thought to be the first big achievement of the Rhode Island Tax Officials' Association, which is an organization

of local assessors and assessors' clerks. The agitation for a uniform date was started two or three years ago and allowed to grow gradually and naturally without any artificial stimulus from the tax department until sentiment had become so nearly unanimous that the act went through the Assembly without an opposing vote in either branch. This act is Chapter 1735 of the Public Laws of 1919.

An amendment was made to an act passed in 1916 imposing a franchise and minimum tax on domestic corporations. The amendment was suggested as a matter of expediency by the attorney-general of the state. Inactive domestic corporations which fail to pay the franchise tax for a period of three years forfeit their charters and as a result of the operation of the law for the past three years, the Commission was about to certify the names of over 2,000 corporations to the attorney-general for dissolution proceedings in the superior court under the General Law. When confronted with the possibility of 2,000 suits for dissolution clogging the Court dockets, he suggested instead of dissolution proceedings, the automatic forfeiture of these charters by certification from the Board to the secretary of state, with provision for reinstatement upon payment of the delinquent taxes.

How such a situation can exist with respect to these old charters may be better understood when it is borne in mind that under the corporation laws of Rhode Island no corporations were ever required to make any kind of a return to any state department, annually or otherwise, until the board of tax commissioners was created in 1912.

An amendment to the Inheritance Tax Act of 1916, which failed of passage, was intended to give the Board access to safe-deposit boxes and in other ways to facilitate administration of the law.

An amendment was made to the law taxing savings and participation accounts in state banks and trust companies, intended to modify an amendment passed a year ago, by limiting the federal bonds which savings banks are allowed to deduct in reporting their taxable deposits to the Bank Commissioner, to those bonds or other evidences of indebtedness which are subscribed for by said banks and purchased at par for their own account and which have been held six months or more next preceding the first day of July in each year. Only such bonds can be deducted as were issued on or after the first day of April, 1918.

The legislature also passed a resolution authorizing the attorney-general, in the superior court proceedings with respect to the receivership of the street railway system, to waive, on behalf of the state, its priority of claim on account of taxes due and payable to the state, in so far as said taxes are a prior claim over the claims of the employees of the street railway company for wages due and unpaid, and awarded said employees by the War Labor Board. Mr. Tobie adds, "Of course this cannot be done, but the legislature did it."

Miss Elwood, who will be remembered as having attended the Chicago conference, representing the Tax Commissioner of **Connecticut,** writes that the last legislature of that state was ultra-conservative in its tax legislation, and provided no new sources of revenue for the state, though it was very liberal in its appropriations; and that, during the last few days of the session "those interested in the condition of the treasury were required to exert a powerful influence for moderation in expenditures."

Municipalities, which in the past have been restricted in bond issues to 5 per cent of the grand list, are now allowed to include in the grand list for such purposes the assessed value of shares of stock of national banks, trust and insurance companies held by their residents, the tax on which is paid by the corporations. Indebtedness incurred for water supply is eliminated in determining the limited percentage of bond issue.

Taxes paid by a mortgagee are now a part of the debt due such mortgagee.

Assessors are required to arrange lists of taxable property of non-residents alphabetically and separate from the list of residents.

The exemption statute was amended and land occupied by buildings belonging to and used exclusively for scientific, benevolent and ecclesiastical societies, definitely exempted. While it has been the practice to exempt such land heretofore, the wording of the statute was somewhat ambiguous.

An act was passed which specifically exempts property of a resident of the state,

located outside thereof, provided such property is taxed where located to the same extent as similar property is taxed in Connecticut. This legislation affects principally deposits of residents of the state in savings banks located outside.

There has been no state supervision of municipal accounting. While the cities and towns have established practical systems, the accounting in the smaller towns, in many instances, has been decidedly crude, having actually no classification or separation of accounts to which citizens could refer, to ascertain the purposes for which indebtedness was incurred and money expended. Blank forms of cash book, selectmen's orders and school orders as now prescribed by the state auditors, are required to be used by all town officials, except where the accounting system used can be satisfactorily shown to be sufficiently complete. The result of this law will be the existence of a uniform system of accounting throughout the state, will permit proper audits to be made with little trouble, and place the affairs of the towns on a business-like basis.

The privilege of deducting the market value of shares of stock in national banks, trust and insurance companies held on April 1st, 1901, and continuously since, in the determination of the franchise tax on savings banks, has been extended to investments in national banks, trust and insurance companies, exchanged because of the merger of any such corporations.

In the determination of the franchise tax of water, gas and electric companies, based upon gross earnings, deduction is allowed for the amount of such gross income which is received from the sale or rental of appliances using water, gas, and electricity, and also of such as accrues from the sale of water, gas, or electricity to other water, gas, and electric companies for distribution in the state.

Choses in action registered in the office of the state treasurer, where a tax of four mills per annum may be paid, are now required to be registered in the name of the owner; a list of such registered owners being returned to the towns wherein they reside. Such procedure will enable the assessors to check up the listing of intangible personalty.

The state has had an antiquated procedure of taxing its mutual fire and life insurance companies on the basis of the market value of assets, the same dating back to 1867. While the tax commissioner has repeatedly advocated a change in the method of taxation, it was not until the last session that the legislature and insurance companies could be convinced that a fairer and more equitable basis should be put in operation. The franchise tax on such companies in the future will be based upon the gross income from interest, dividends, rents and other investment income, exclusive of rents from Connecticut real estate, the tax to be 4 per cent in 1920 and 1921, and 3½ per cent thereafter. Deduction is allowed of income from certain evidences of indebtedness which are exempt in the hands of individual holders.

The inheritance and penalty tax statutes were amended, certain administrative changes being made to make the same more practical in operation. Rates, exemptions and classes of beneficiaries, however, remain the same as previously.

While no bill was introduced providing for the repeal of the income tax on miscellaneous corporations, it was impossible to secure legislation which would eliminate the deduction in arriving at the income of interest on bonds, notes and other evidences of indebtedness of the United States; excess and war profits tax; and the $2,000 exemption; and thus provide for a tax upon the net income of the corporation rather than upon the "net income as taxed by the United States government."

Mr. Henry H. Bond writes of **Massachusetts** legislation as follows:

During the current year Massachusetts has enacted an income tax act for domestic and foreign business corporations. The old "corporate excess" tax is retained in the new law as a *part* of the new tax, to operate as a minimum provision, but with its rate reduced to five dollars per thousand. Income assignable to Massachusetts is taxed at 2½ per cent, and in the allocation, equal weight is given to the location of tangibles, payroll and gross receipts.

As a step toward even greater progress, the constitutional amendment allowing classification of property for taxation received its first passage.

After two years of temporizing, the distribution of the proceeds of the income tax on individuals received a final solution,—

eventual distribution to the cities and towns on the basis of the state tax that each pays. This is to be accomplished gradually, however, over a ten-year period, in an increasing percentage, the balance in the meantime going to the cities and towns on the basis of reimbursement for the loss of intangibles from local taxation.

To pay approximately $20,000,000 in bonuses to its soldiers, the state passed the following temporary taxes: a $3 increase in poll taxes; one per cent on income of corporations; one-half of one per cent on interest and dividends taxable under the income tax law for four years; an additional 25 per cent on inheritance taxes for one year; and $660,000 state tax. To secure additional revenue and reduce the state tax, the income tax on individuals, partnerships and fiduciaries for the current year and for 1920, with respect to salaries and other business income, is temporarily increased from 1½ to 2½ per cent. A sum estimated at about four million dollars was also appropriated annually from the income tax revenue to a state school fund, to be used in assisting various committees in paying adequate salaries to teachers.

Pending the operation of the new income tax on business corporations, one defect in the old franchise tax is cured for the current year by providing for the deduction (from the share value) of the value of property *situated* in another state, omitting the old requirement that it be taxable therein. This is a recognition of the changed conditions in New York and elsewhere, where income and not property are now being taxed.

The minimum pay for assessors was at last ordered increased from $2.50 per day to $3.50.

In the reorganization and consolidation of departments, boards and commissions, in conformity with a constitutional limitation on their number adopted last year, the tax commissioner's department remains intact under the new title of "Department of Corporations and Taxation", but there is transferred to it the work formerly performed by the controller of county accounts and by the bureau of municipal statistics, including the auditing of municipal accounts and the certification of town notes. The office is to be organized with two deputies as formerly, and with a director for each of its five divisions,—income tax, corporations, inheritance tax, local taxation and accounts.

From Chairman Haugen of the **Wisconsin** Commission we find that no material changes were made in the taxation laws by the recent session of the legislature. Some matters of importance, however, had attention.

Assessor's compensation was changed in towns and villages and smaller cities from $3 per day to not less than $3 nor more than $5 per day. In cities of the third class, the assessor may be required by order of the common council to devote his entire time to the duties of his office.

The reassessment statute was materially strengthened. The requirement of 10 per cent of the valuation to be represented upon petition for reassessment was reduced to 5 per cent and the tax commission authorized to reassess specific classes of property.

The grain tax was increased from ¼ of a mill per bushel to ½ mill per bushel on wheat and flax and from ⅛ mill to ¼ mill per bushel on other grain. This applies to grain passing through elevators and warehouses and is the same as the Minnesota law.

The poll tax was abolished. It has been practically a dead letter on the statutes.

Tax receipts outside of Milwaukee County must state separately the state, county, and local taxes.

The inheritance tax law was so changed as to give the beneficiary only a proportion of his share of expenses and exemptions when the property of the estate is partly outside of Wisconsin.

Changes made in the income tax were as follows:

Contributions or gifts made by the taxpayer may be deducted in an amount not in excess of 15 per cent of the net income if made to associations organized and operated exclusively for religious, charitable, scientific, or educational purposes or to societies for the prevention of cruelty to children or animals.

Losses resulting from the operation of business or the ownership of property may be deducted only when income derived from such business or property would be subject to taxation.

The deduction of taxes paid within the

year is made to include taxes paid to the United States as income, excess profits, or war profits taxes.

The secrecy provision of the income tax law was changed so as to permit information to be given to taxing officials under certain restrictions.

A Soldier Bonus bill was passed, appropriating to each soldier in the late war a sum equal to $10 for each month of service, minimum to be $50. This amount was not to exceed $16,000,000 and to be collected in part on incomes and in part from property. This law was submitted to a vote of the people on referendum and was endorsed by popular vote of almost three to one.

At a special session of the legislature called for that purpose, a further bonus bill was passed appropriating an amount equal to one-fifth of the original bonus bill, to men and nurses serving in the late war, for educational purposes, such law to continue in force for five years. The total amount may equal the amount provided by the original bonus bill.

Mr. J. Lord Rigby, Chief of the Bureau of Corporations in the Department of the Auditor General of **Pennsylvania,** calls attention to three acts passed by the last legislature, having to do with the more effective collection of the 4 mill tax on loans and with the simplification of the method of assessment thereof.

Act No. 374 provides that corporations shall collect and pay the tax on obligations for which default has been made in the payment of interest in past years. The courts have held that under the previous acts a tax could only be collected for the year in which the interest was paid. Many corporations, where the bonds were closely held, made default for two or more years, and then paid the entire unpaid interest in the third year, thus escaping the tax for the two years in which default had been made.

Act No. 375 amends section 17 of the Act of June 17, 1913, P. L. 507, by establishing definitely the class and character of obligations of corporations which are proposed to be taxed.

Act No. 376 amends section 18 of the Act of June 17, 1913, P. L. 507, by definite interpretation of what constitutes doing business in the state by a foreign corporation, and provides a method for the collection of tax on loans of foreign corporations if the same are found to be taxable under the present law.

O. K. Shimansky, Secretary of the **Ohio** State Board of Commerce, writes that the voters of that state are again to pass judgment on the subject of classifying property for purposes of taxation. The legislature has submitted to the people a proposed amendment, which amends section 2 of article XII, to read as follows:

> "All property shall be taxed by such rules and methods and in such classes as may be provided by law. The rules and methods shall be uniform within the classes so established."

In November, 1918, the people adopted an amendment providing for classification and at the same time an amendment authorizing the legislature to exempt mortgages from taxation. The courts held that there was a conflict in the adoption of the amendments and that the mortgage exemption amendment was carried because it received a larger majority than the classification amendment.

This last spring, the Ohio General Assembly submitted to the electors the proposed amendment printed above. The Ohio Taxpayers' League is now conducting a campaign in the interest of the classification amendment and there is every indication that the amendment will again be approved by the people. The proposal is being opposed by leaders of the state grange, who argue that classification will increase the tax charge against farm lands. They cite isolated cases in Kentucky where under classification some farmers pay more taxes than they did under the uniform rule, but do not take into consideration the fact that the tax charge as a whole in Kentucky against real estate has been reduced under classification from 76 per cent to 57 per cent.

We are indebted to W. R. Loyd of **Alabama** for information as to the important tax measure adopted by the legislature at its adjourned session recently brought to a close. This measure embraces in one act a general overhauling of the revenue acts heretofore existing, resulting in a bill of some 200 pages, constituting what amounts to a tax code. All property is to be assessed at 60 per cent of its full value.

Important administrative changes are made, including provisions for some sixty-odd new offices. County tax supervisors are established on a salaried basis, with power over local assessments. A state tax commission is created, consisting of three members appointed by the governor for terms of four years, with adequate powers.

The state enters upon income taxation through the enactment of a complete personal income tax law at graduated rates, applicable to residents upon their entire income, except dividends from corporations which are also made subject to the graduated income tax. Non-residents are also subject to tax upon income from sources within the state. The details of determining income and many other features follow the New York law. Exemptions include rentals from real or personal property, which is understood to be required by a constitutional provision. All taxes are allowed as a deduction. A reciprocal credit for income taxes is allowed a non-resident. Withholding from personal service income is provided in the case of income of non-residents, as in the New York law. As before stated, the tax is applied at graduated rates to corporations, both domestic and foreign.

The law is placed under the general supervision of the tax commission, one member of which is to be appointed Income Tax Supervisor. County supervisors, local tax assessors, and local collectors assess and collect the tax.

The tax is divided, after deducting commissions to the local collector, 25 per cent to the county where the taxpayer resides, 35 per cent to the municipality and the balance to the state. In its original form the bill provided for an excess profits tax. This was strenuously opposed and was dropped. The bill carried an elaborate scheme for the creation of district tax courts, but it is understood that this feature has been eliminated.

An elaborate revision of the license taxes was made, with increases in some schedules, the automobile license being increased 50 per cent. A coal and iron tonnage tax was levied at two cents per ton for coal and three cents for iron ore.

It is estimated that the new laws will raise about 20 per cent additional revenue for the state and from 10 per cent to 20 per cent additional for the counties.

A large share of the credit for shaping this important tax legislation is understood to be due to the persistent efforts of Governor Kilby, a member of this Association.

Secretary Ives of the **Minnesota** commission thus describes the recent mine tax agitation in that state:

"For the second time within a decade the iron mining interests of Minnesota have been relieved from the burden of a so-called tonnage tax through the intervention of an executive veto. At an extra session of the legislature which was called on September 8th to enact a soldiers' bonus law and provide for adequate fire prevention in the North Woods district, a bill was passed imposing a 5 per cent supertax on the net value of all iron ore mined in the state. The vote in the House was 101 to 22 and in the Senate 38 to 28. On September 19th this act was vetoed by Governor Burnquist. An effort to rescind the resolution adopted the first day of the session fixing September 19th as the final day, failed, and the legislature adjourned without being able to act on the veto message.

Tonnage tax legislation, so-called, has been before every session of the Minnesota legislature, with one exception, since 1907. In 1909 a bill imposing a tax of from two to five cents per ton on all ore mined, the rate depending on quality, in lieu of all other taxes for state purposes, was passed but was vetoed by Governor Johnson. At all other sessions tonnage tax bills have failed. Last spring at the regular session a bill imposing a tax of 10 per cent on the net value of all ore mined, was defeated in the House by a close vote. This bill differed from the one passed at the special session in that no attempt was made to define net value. As the measure vetoed is unique in many particulars, the chief provisions may be of general interest to tax students. They follow:

"Sec. 1. Every person, copartnership, association, joint stock company or corporation engaged in the mining or production in this state of iron ore or other ores shall pay to the State of Minnesota, for state purposes only, a tax which, except as provided in Sec. 5 of this act, shall be in addition to the taxes levied and collected upon an ad valorem basis upon such mines and mining property and the appurtenances thereunto belonging, equal to five per cent of the value of all ores produced and shipped from such mine and mines;

said tax shall become due and payable from such person, copartnership, association, joint stock company, or corporation on June 1st of each year for the calendar year covered by the report thereupon to be filed as hereinafter provided."

"Sec. 2. The value of ore for the purposes of determining the amount of taxes to be paid under the provisions of Section 1 of this act shall be ascertained by subtracting from the prices received, or to be received, for the ore at the place of sale.

"1. The cost of labor for separating the ore from the ore deposit and placing it in cars for shipment from the mine.

"2. The cost of washing or drying such ore, if the same is washed or dried.

"3. The cost of transporting the ore from the mine to the place of sale.

"4. If taken from open pit mines an amount for each ton mined equal to the cost of removing the overburden divided by the number of tons of ore uncovered; the amount of ore uncovered to be determined by the Minnesota Tax Commission.

"5. If taken from underground mines, an amount for each ton of ore mined equal to the cost of sinking and constructing shafts and running drifts to take out the ore divided by the number of tons that can be advantageously taken out through such drifts and shafts; the number of tons of ore that can be advantageously taken out in each such case to be determined by the Minnesota Tax Commission.

"In all cases where ore is smelted before sale or disposed of otherwise than by ordinary sale, the price of the same for the purposes of this act shall be the average market price for like kinds and grades of ore during the calendar year in which such ore was mined."

It will be observed that in effect the bill provided for a flat rate income tax in addition to all ad valorem taxes now imposed, the revenue derived to be used for state purposes only. The method of determining the "value" of the ore also is clearly defined.

It was provided, however, in section 5, that in computing the tax to be paid under the proposed law, the Minnesota Tax Commission should determine the amount of taxes assessed and levied on an ad valorem basis for the preceding calendar year on the taxable value of the ore in each producing mine and in each stock pile, and deduct from the total found to be due on account of the 5 per cent super-tax imposed, an amount equal to the taxes so assessed and levied on an ad valorem basis on the tonnage shipped from such producing mine or from any such stockpile during the calendar year. The purpose of this section was to impose a uniform tax on mined ores and to avoid collecting a double tax annually on such ores.

That the vast iron-ore deposits in northern Minnesota are a state heritage and that the people are entitled to a considerable additional revenue from this source on this account and also in view of the rapid depletion of the merchantable ore bodies, was the chief contention of the proponents of the super-tax measure.

The opposition claimed that the mines are now paying a super-tax, in that ore is assessed at 50 per cent of full value under the classified assessment law while other property is assessed at from 25 to 40 per cent of full value, the average being about 33⅓ per cent. Discrimination against the northern part of the state and in favor of the agricultural regions to the south and west was also urged. The issue is still a live one politically, despite the Governor's veto and there is no doubt but that at the 1921 legislative session the tonnage tax fight will be continued.

Any measure that is passed in the future and receives executive approval will no doubt be tested in the United States courts before it can be enforced.

The act vetoed would have produced estimated additional revenue of $3,750,000 on the basis of an annual shipment of 40,000,000 tons. This year the mining properties of the state paid $13,048,053 in ad valorem taxes for all purposes, state and local, as compared with $10,395,202 in 1918.

TAX PROGRESS IN ARIZONA

C. M. ZANDER

An address at the Seventh Annual Arizona Tax Conference, held at Grand Canyon, Arizona

We are meeting here in the El Tovar Hotel on the brink of the world's masterpiece. There is, perhaps, no more auspicious place in the United States to hold a tax conference. Certainly the conferences held here have far surpassed in interest, attention and results those held in any other part of the state. This is perhaps due to the fact that here amid these inspiring scenes we are removed from all

things that are sordid—the ideal place to consider perhaps the profoundest subject of government. Here we can lift our eyes from the routine and look at the subject in the perspective.

We often hear that the tax question is a dry matter, but if we stop to think of it we will realize its wonderful significance. This has recently been impressed upon me again in my attendance upon the National Tax Conference held in Chicago last month. There the question of the federal income tax absorbed by far the major portion of the time.

What is this income tax? Perhaps we can more fully realize what it is by stepping back in history a period and studying the subject by contrast. In this country we have had the ad valorem tax on all physical property, including real estate, without any income tax as a companion. In England they have had the income tax without any tax upon real estate as a companion. As a result of the system in England a very large idle class was supported by entailed estates consisting of the major portion of the land of the domain which paid no tax to the government. Not having to pay any tax, great portions of this land produced nothing because it was not necessary to earn any fixed charges and the great mass of the English people were detached from a freehold independence and irretrievably fastened to the soil. As a result of this deplorable situation there was established in that country a class of parasites, bigoted and undemocratic on one hand, and a class servile and undemocratic on the other hand. No situation could be more repugnant to a free people than this. The House of Lords was the bulwark of this system.

There must certainly have been the hand of Providence directing the destiny of England when the great Commoner, Lloyd George, started on his path of glory that was to save the British Empire and perhaps the entire civilization of the world from destruction. There is not the slightest doubt in the mind of any student of the last war but what the tax reforms forced by Lloyd George upon the British nation were the inspiration that solidified the sturdy yeomanry of that country behind the leadership of the great Commoner. This tax reform was principally the levying of a tax upon all land and estates by the Imperial British Government. The issue was carried successfully through several campaigns by Lloyd George and to bring it about, the House of Lords, the last essence of the Norman conquerors, had to be practically abolished. Since this tax has been imposed, the peerage of England is making feverish haste to sell off these lands upon easy terms to the people of England.

It was this tremendously and bitterly fought tax reform that gave Lloyd George that leadership of the masses of the people of England that enabled that country to put up the gamest fight it has made since its defeat by William the Conqueror in 1066. This was accomplished by taxation —which we sometimes call dry.

In this country the record reads somewhat the reverse. We have never allowed any entailed estates nor have we ever allowed any real estate to be held free from tax burdens, thereby permitting large domains to be held in idleness away from the reach of the people; but we have not had an income tax. As a result, we have seen tremendous fortunes created and handed down from generation to generation, consisting of intangible personal property arising out of the new and complicated methods of doing business, which were more easily adaptable to unstable government than any other class of property, and yet which paid no taxes or tribute to federal, state or local governments. As a result we had upon the one hand a class of people restless under a smarting sense of deep injustice, which feeling was abundant capital for unreasoning minds; and upon the other hand a class of people becoming more and more autocratic because they retained the essence of autocracy, and becoming less and less democratic because they less and less performed the greatest requirement of democracy, namely, the contribution from their wealth for purposes of democracy.

The addition of the federal income tax to the tax system of the United States was brought about just before the great war, and for the first time a just and equitable distribution of the tax burdens of the country was had. When you have equality in taxation you have a willingness upon the great part of the people to contribute of their substance without stint for a cause that is worthy. This is just what made it possible for the world to witness the most

stupendous contribution of wealth by a united and unanimous democracy for a cause that to it was more altruistic than it was to any other nation involved. Can anyone say in the face of these things that taxation is dry?

The equitable distribution of taxes means as much for the states as it does for the nation, and that is where we come in. That we have made progress can be measured perhaps in several ways. One of these ways is to attend the National Tax Conference. I wish every county assessor in the state of Arizona could attend at least one National Tax Conference, and I thoroughly believe that each county could well afford to pay the expenses of that attendance so that every assessor could by contrast find himself. The state of Colorado had eleven assessors in attendance upon the last conference; Arizona had one.

A great many states wonder how we accomplish so much. Great and wealthy and old-established commonwealths stand in humble respect to the state of Arizona, and devoutly hope that the day may come when they can do as well. The thing that these older states cannot understand is the wonderful team-play of the assessors in Arizona. The more I learn of the difficulties of the states that are backward, the more I appreciate what team-play has done for Arizona, and this *esprit de corps* is due entirely to these tax conferences we hold every year. Under our system of taxation there is no chance of making any progress without the splendid spirit of the members of these conferences.

Another way to measure our progress is to note the spirit with which the people of Arizona contribute taxes for public improvements, education and social betterment. Almost coincident with the advent of better equalization of taxes in Arizona has been a remarkable expansion of public expenditures,—and I want to say right here that it is not the policy of an enlightened people in this day to keep down public expenditures to the irreducible minimum. I want to call your attention to the fact that wherever you find a state in the United States that has made real progress towards equality of taxation you will find a state that is very progressive, a state that spends large sums for the general benefit and advancement of its citizens; and conversely, wherever you find a state that is not making much of an effort to raise the standard of life of the general average of the citizens you will find a state that is very backward in the distribution of its tax burdens.

This general statement will apply particularly to Arizona. Is there a state that has spent more money for roads per capita or according to its wealth in the same length of time than has Arizona? Is there a state that is putting more money into its school system than is Arizona? Is there a state that is giving as much attention to the social protection and the development of its citizens than is the state of Arizona? Very few. Why is it? Other states have wealth, other states have the same class of citizens. Undoubtedly the answer is equitable taxation. I think I may cite to you another remarkable incident that will emphasize the progress we are making.

It is the common remark generally accepted as a fact by all that the farmer is the slowest citizen there is to vote a tax upon himself. The farmers of Maricopa County have had that reputation all over the rest of the state. For a time they took this position through a feeling that the tax when voted would be unfairly distributed. Recently they have voted a burden of four million dollars upon themselves for good roads, and the remarkable thing about that vote was that in nearly all the farming precincts the vote was almost unanimous. These same farmers always heretofore refused to consider any tax burden of such relative size. Other equally enlightened farmers and other equally wealthy districts are needing roads equally as badly as they need them in Maricopa County, and yet they refuse to incur the burden and will refuse for years to come, or, in my judgment, until their whole attitude is changed by change in the tax burdens. This is the record so far. In the light of these facts should anyone say the subject is dry?

And what of the future? Shall we call it a good job and quit? I think hardly. Arizona is a state possessing a most marvelous climate, endowed with unlimited resources yet undeveloped. We have here the mountain, and the plain, and the variety of industries and life that makes an ideal setting for a broad, fearless and enlightened people. If we distribute the burden of taxation fearlessly and equitably, the people, through one fiscal policy or another, will make available the funds neces-

sary to develop all the material resources of the state. And more than that, the sense of justice superinduced by just taxation will be reflected in a near approach to democratic relations, in business, society and religion — fundamentals necessary before any people can become strong, enduring and contented. This is taxation—which we sometimes call dry. Is the job worth while?

REMOVING THE DEBT INCUBUS BY A "CAPITAL LEVY"

A. M. SAKOLSKI

The gross indebtedness of the civilized nations has risen in four years from 27 to over 250 billions of dollars. This tremendous debt burden promises to be a serious political and economic factor in the world's future progress. It is an incubus that is not yet fully grown; yet the richest and strongest among the nations are considering radical proposals to cast it off once and for all. Russia's and Hungary's threatened debt repudiation, France's clamor for German indemnities to pay for both her losses and her borrowings, and the recent proposals in Great Britain that wealth be proscripted to redeem the nation's war bonds, are indications that governments, like corporations, occasionally require financial "reorganizations" to keep going. There are no international bankruptcy courts, so that each nation must settle accounts with creditors in accordance with its own ideas of integrity and justice.

A scheme of national debt cancellation through a special levy on physical wealth now has the support of the British Labor party. It was first proposed more than two years ago by the Fabian Socialists and has been seriously considered by British economists.[1] There is yet no general agreement as to the limits of the proposal. Mr. Sidney Webb, the renowned Fabian, would have the government appropriate only productive wealth. Mr. F. W. Pethick Lawrence demands a more sweeping sequestration. He would have all material goods, whether productive or non-productive, contribute pro rata towards national debt redemption. The state would not only levy on income producing property such as lands, factories, ships, railways and investments, but also on personal chattels as furniture, jewelry, pleasure cars and clothing. As the taxpayer has the option of paying in cash or in goods, a millionaire could surrender a Van Dyke or a Rembrandt, and less opulent denizens may contribute their rocking chairs or waistcoats. It is assumed that the government will be able to dispose of the property for cash, but it is not so readily conceivable that values can be maintained during a period of general property dissolution. The supporters of the "special levy" proposition are mindful of this situation, for notwithstanding their advocacy of a single toll "once and for all" they would permit a partial payment system when these payments are secured by a property pledge. The state is thus made a universal mortgagee as pitiless, perhaps, as the rich rascals in the old-fashioned dime novels.

Many specious arguments are offered in support of the "capital levy" theory. It aims primarily to avert burdensome future taxation that falls more heavily on those who fought and suffered than on those who amassed wealth because of the war. The huge national interest burden which benefits the wealthy classes at the expense of the others will also be eliminated. Since the proposed "levy" is to be "steeply graduated" in the manner of income tax exactions, it will tend to promote a more equal wealth distribution without subverting the equality of sacrifice taxation ideal.

These contentions are open to serious criticism. Even assuming that it is entirely feasible to segregate and apportion all forms of physical wealth by state sequestration, the scheme, unless carefully administered, is most inequitable. The possession of property is no gauge of ability to pay. This is axiomatic and is manifest in the trend of modern taxation away from

[1] See *The Economic Journal*, March, June and September, 1918; also Professor Seligman's article "Post-bellum Fiscal Projects in Great Britain and France", in the BULLETIN, Dec. 1918.

a property toward an income basis. The appropriation of physical wealth by the state, taxes the thrifty but allows the spendthrifts enjoying large professional incomes to escape. It handicaps business but does not directly fall on the professional and salaried classes. A conscription of "earned" incomes might go hand in hand with a property assessment, but it is a difficult taxation problem to make these two schemes operate concomitantly. Income from services and income from investments—these two constituting "earned" and "unearned" incomes respectively—are drawn largely from the same source, viz: industrial undertakings. The state, however, reaps the full value of an income tax return, whereas a sequestration of physical property is likely to create widespread depreciation that may render the specified goods received almost worthless.

The conversion of the capital levy from a surrender of physical property to a cash equivalent, payable in instalments, has all the disadvantages and none of the advantages of a simple tax proposition. If the sequestered property is permitted to be held privately under a government lien, the periodical cash payments on account of principal would be transferring the debt burden from the state to the individual. The interest cost of the public debt would still remain and without the check on government extravagance that accompanies a large national debt.

A careful analysis of the "capital levy" idea leads to the conclusion that in its practical application it would not differ essentially from income taxation. As John Stuart Mill pointed out more than fifty years ago it "would be merely surrendering to a creditor the principal sum, the whole annual proceeds of which were already his by law and would be equivalent to what a land owner does when he sells part of his estate to free the remainder from mortgage."

The idea, moreover, is not new. It was proposed by Hutcheson, Asgill, Barbier, and Hooke in the eighteenth century. Ricardo discussed it thoroughly in 1852 in his "Essay on the Funding System." The French chocolate king Menier, in 1874 strongly advocated wealth conscription in his pamphlet "L'impot sur le capital." Its revival at this late day, however, is probably receiving more consideration than formerly, largely because of the success of New Zealand and Australia in imposing a minimum quota under penalty, for subscription to war loans. Whether a logical result of forced subscription is forced cancellation is still to be determined.

TAX JURISDICTION OF LITTORAL STATES TO THE THREE-MILE LIMIT

MARTIN SAXE

In 1917 the New York State Tax Commission, in the exercise of its functions under the Tax Law, assessed the special franchise property of the Atlantic cable companies, incorporated in New York under the Telegraph Companies Act, having their terminals in New York City, and included the submarine cables extending from low-water mark oceanward to the three-mile limit.

The New York Tax Law includes in the definition of *"real estate"*, the value of the *right or authority* to construct, maintain and operate tangible property "situated in, upon, under or above any street, highway, public place or *public waters"; the right or authority* is defined as a "special franchise" and the tangible property so situated and used in connection therewith is taxed as a part of such special franchise. The state tax commission is the assessing body for special franchises, the assessments being certified to the tax districts in which the special franchises are located and entered by the local authorities upon the tax district rolls for real-estate assessments.

The assessment of the Atlantic cables to the three-mile limit in the ocean presented the interesting questions of whether the construction, maintenance and operation of a submarine cable from low-water mark to the three-mile limit is a special franchise, and whether the land under water from the low-water mark of the Atlantic shore of New York City to the three-mile limit is

part of the tax district of the City of New York.

The New York courts have held that the so-called Telegraph Companies Act of 1848 conferred upon companies incorporated under it a taxable special franchise, by authorizing such corporations to construct telegraph lines "upon, over or under any public roads, streets and highways, and *through, across or under any of the waters within the limits of this State.*" (*Peo. ex rel. Postal Telegraph-Cable Company* v. *Tax Commission*, 181 App. Div. 777; aff'd 224 N. Y. 167.)

In *Hardin* v. *Jordan*, 140 U. S. 371, the Supreme Court, by Mr. Justice Bradley, said (p. 381):

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery — and cannot be retained or granted out to individuals by the United States. *Pollard* v. *Hagan*, 3 How., 212; *Goodtitle* v. *Kibbe*, 9 How., 471; *Weber* v. *Harbor Commissioners*, 18 Wall., 57. Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. See *Manchester* v. *Massachusetts*, 139 U. S., 240; *Smith* v. *Maryland*, 18 How., *McCready* v. *Virginia*, 94 U. S., 391; *Martin* v. *Waddell*, 16 Pet., 367; *Den* v. *Jersey Co.*, 15 How., 426."

Manchester v. *Massachusetts*, 139 U. S. 240, thus cited by Mr. Justice Bradley, is perhaps the leading case on this subject. Manchester, the plaintiff-in-error in that case, had been fined by a criminal court of Massachusetts for violation of an act of the Massachusetts Legislature for the protection of fisheries in Buzzard's Bay. It appeared that he was fishing at a point about a mile and a quarter from the shore. The Trial Judge instructed the jury (p. 245):

"That the place where the acts of the defendant were committed, being within a marine league from the shore at low-water mark, was within the jurisdiction of the Commonwealth."

In the United States Supreme Court the judgment of the Massachusetts Court was sought to be reversed on the ground that the statute of Massachusetts extending the territorial jurisdiction of that state to the three-mile limit was repugnant to the federal constitution and the laws of the United States, both by reason of exclusive control by the federal government of ocean fisheries, and also the exclusive character of the judicial power of the United States in all cases of admiralty and maritime jurisdiction. In overruling this contention, the Supreme Court, by Mr. Justice Blatchford, said:

". . . By the definitive treaty of peace of September 3, 1783, between the United States and Great Britain (8 Stat., 81), His Brittanic Majesty acknowledged the United States, of which Massachusetts Bay was one, to be free, sovereign and independent States, and declared that he treated with them as such, and, for himself, his heirs and successors, relinquished all claims to the government, propriety and territorial rights of the same and every part thereof. Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations, and her right to control the fisheries within those boundaries would be conceded." (pp. 256-257).

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; . . . and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common rights of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." (p. 258).

"It is further contended that by the Constitution of the United States the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and is exclusive; that this case is within such jurisdiction; and that therefore the courts of Massachusetts have no jurisdiction over it. In *McCready* v. *Virginia*, 94 U. S., 391, the question involved was, whether the State of Virginia could prohibit the citizens of other States from planting oysters in Ware River, a stream in Virginia where the tide ebbed and flowed, when her own citizens had that privilege. In that case it was said, *that the principle*

had long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away; and that, *in like manner, the States own the tide-waters themselves* and the fish in them, so far as they are capable of ownership while running; and this court added, in its opinion: 'The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grants of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. *The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.'*" (pp. 259-260).

". . . The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State." (p. 264).

In Wheat. Int. Law, § 177, the maritime territorial jurisdiction of an independent nation is defined as follows:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same state. *The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along the coasts of the state.* Within these limits its rights of property and territorial jurisdiction are absolute and exclude those of every other nation."

And in Kent's *Commentaries* it is laid down that:

"According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as a cannon shot will reach, and no further, and this is generally calculated to be a marine league. . . ."

In *People* v. *New York and Staten Island Ferry Company*, 68 N. Y. 71, the Court, by Andrews, J., said (pp. 77-78):

". . . The title to lands under tidewaters in this country which before the revolution was vested in the king, became, upon the separation of the colonies, vested in the States within which they were situated. The people of the State in their right of sovereignty succeeded to the royal title, and through the legislature 'may exercise the same powers, which previous to the revolution, could have been exercised by the king alone, or by him in conjunction with parliament; subject only to those restrictions which have been imposed by the Constitution of the State, and of the United States' (Chancellor in *Lansing* v. *Smith*, 4 Wend., 9). The public right in navigable waters was in no way affected or impaired by the change of title. The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given by the federal Constitution. (*Rogers* v. *Jones*, 1 Wend., 261; *Gould* v. *H. R. R. R. Co.*, 6 N. Y., 522; *The People* v. *Tibbetts*, 19 N. Y. 523)."

Following *People* v. *New York and Staten Island Ferry Company*, supra, the Appellate Division, Second Department, in *Consumers Coal and Ice Company* v. *City of New York*, 181 App. Div. 388, said at page 394:

"Whether public waters are within bays or *the three-mile limit* on the open sea, they are subject to the municipal law, within the exercise of the paramount right of Congress to regulate commerce, and the State through the Legislature, within such limitation, may 'confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right' (*People* v. *New York and Staten Island Ferry Co.*, 68 N. Y., 78)."

There are numerous expressions in the decisions and in the text books in addition to those cited which uphold the doctrine that the territorial jurisdiction of each state of the Union having a coast line extends oceanward to the three-mile limit.

Thus in *Shively* v. *Bowlby*, 152 U. S. 1, the Court, by Mr. Justice Gray, said at pages 14-15:

"The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide-waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States." *Johnson* v. *McIntosh*, 8 Wheat., 543, 595; *Martin* v. *Waddell*, 16 Pet., 367, 408-410, 414; *Commonwealth* v. *Roxbury*, 9 Gray, 451, 478-481; *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom (34 N. J. Law), 532; *People* v. *New York and Staten Island Ferry*, 68 N. Y., 71.

Again at pages 20-21:

"In New York, it was long considered as settled law that the State succeeded to all the rights of the Crown and Parliament of England in lands under tide waters. . . ."

In *Knight* v. *United States Land Association*, 142 U. S. 161, the Supreme Court said at page 183:

"It is the settled rule of law in this Court that absolute property in and dominion in and sovereignty over, the soils under the tide waters in the original states were reserved to the several states."

And in *St. Clair* v. *Livingston*, 23 Wall 46, the court said (p. 68):

"By the American Revolution the people of each state, in their sovereign character, acquired the absolute right of all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively."

See also: Gould on *Waters*, 3rd Edition, p. 4; *American and English Encyclopedia of Law*, Vol. XVI, p. 1132, Vol. XXI, p. 430; *People* v. *Steeplechase Park Co.*, 218 N. Y. 459.

It is only as regards claims to jurisdiction beyond the three-mile limit that there has been uncertainty or lack of consensus of opinion at times giving rise to doubt or controversy in respect of which the courts have held themselves bound to follow the view taken by the political department.

Concerning littoral waters included within the three-mile limit, however, the doctrine affirming this extent of jurisdiction in each state or nation had been thoroughly recognized as a doctrine of international law by the time the United States became a nation. In view of the distribution of powers between the federal and state governments in this country, the assertion of territorial jurisdiction to the three-mile limit involved conversations or negotiations with foreign countries, and, therefore, devolved upon the national government even though the territory in respect of which the right was asserted belonged to the states.

Professor Moore in his *International Law Digest*, Volume I, pages 701 to 721, shows that the federal government has consistently, ever since 1796, asserted the limit of one sea league as included within our territorial seas. Professor Moore quotes a letter of Secretary of State Bayard to Mr. Manning, Secretary of the Treasury, dated May 28, 1866, in which, after reviewing the various precedents, beginning with a letter of Mr. Jefferson when Secretary of State on November 8, 1793, to the Minister of Great Britain, and a circular of November 10, 1793, to the United States District Attorneys, both affirming the three-mile-limit doctrine, Mr. Bayard summarizes the precedents as follows, at page 720:

"We may, therefore, regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shores does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. . . ."

"The position I here state, you must remember, was not taken by this Department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting them nothing more; and this limit was afterwards reasserted by Mr. Seward during the late Civil war, when there was every inducement on our part not only to oblige Spain, but to extend, for our own use, as a belligerent, territorial privilege. When in 1807, after the outrage on the *Chesapeake* by the *Leopard*, Mr. Jefferson issued a proclamation excluding British men-of-war from our territorial waters, there was the same rigor in limiting these waters to three miles from shore. And during our various fishery negotiations with Great Britain we have insisted that beyond the three-mile limit British territorial waters on the northeastern coast do not extend. Such was our position in 1783, in 1794, 1815, in 1818. Such is our position now in our pending controversy with Great Britain in this important issue. . . ."

The national government has asserted this claim of territorial jurisdiction up to the three-mile limit by its executive department not only in connection with foreign relations, but also through the Federal Judiciary in matters of municipal law, involving the administration of justice in criminal and civil cases affecting citizens. This question has arisen under the U. S. Rev. St., § 730 (U. S. Com. Stat., 1901, p. 585), which creates and defines a punishment for certain offenses committed "upon the high seas or elsewhere *out of the jurisdiction of any particular state or district.*"

Going back to the earliest history of the

State of New York, it further appears that the legislature had asserted from the outset a jurisdiction broad enough to cover this three-mile littoral area which the contemporaneous principles both of international and common law recognized as in every state or nation.

Thus the Public Lands Law (Laws of 1909, chap. 50) contains in Section 4 thereof a provision derived from the Laws of 1779, Chapter 25, Section 14, which provides as follows:

"§ 4. *Vesting of crown lands in people of the State.* The absolute property of all messuages, lands, tenements, hereditaments, and of all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures, debts, dues, duties and services by whatsoever names respectively the same are called and known in the law, and all right and title to the same, which next and immediately before the ninth day of July, in the year of Our Lord one thousand seven hundred and seventy-six, did vest in, or belong to, or was, or were due to the Crown of Great Britain be, and the same and each of and every one of them hereby are declared to be, and ever since the ninth day of July, in the year of Our Lord one thousand seven hundred and seventy-six, to have been, and for ever after shall be vested in the people of this State, in whom the sovereignty and seigniory thereof, are and were united and vested, on and from the said ninth day of July in the year of Our Lord one thousand seven hundred and seventy-six."

This enactment was made and refers back to a time when the "three-mile limit" was already fully recognized as a doctrine of international law, and, it is submitted, constitutes a statutory recognition of the devolution upon this state of the King's sovereignty and ownership over tide waters, including the three-mile area. Not only was that a doctrine of international law but it was imbedded in our jurisprudence as a principle of the common law at the time when the State of New York began its existence.

The United States Supreme Court in *Shively* v. *Bowlby*, 152 U. S. 1, p. 57, stated this principle of the common law as follows:

"At *common law*, the title and the dominion in lands flowed by the tide were in the King for the benefit of the Nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States."

And as stated by Professor Moore in his *International Law Digest*, Volume I, page 701:

"By the common law, title to the soil under tide waters, below high-water mark, unless private rights in it have been acquired by grant or prescription, is in the king, subject to the public rights of navigation and fishing. Upon the American Revolution, the title to and dominion over tide waters and the lands under them vested in the several states, though certain rights were afterwards surrendered by the constitution to the United States."

It is consistently with this view that Judge Ingraham, in writing a concurring opinion in the case of *Lennan* v. *Hamburg American Steamship Co.*, 73 App. Div. 357, said at page 362:

"I concur with Mr. Justice O'Brien and wish to add that the judgment of Brett, J. A., in *The Queen* v. *Keyn* (2 Exch. Div., 124) correctly states the common law as to the jurisdiction of the State over the waters within a maritime league of the shore. That such was the common law of England has been expressly declared by Parliament and seems to be concurred in by the Courts of England and the United States (See Note to this case in 5 Eng. Rul. Cas., 973)."

It has been shown that within the "three-mile limit" the state's right of property and territorial jurisdiction are absolute.

"In this country, counties are dependent for their existence upon the consent of the legislature, which may change their boundaries at pleasure, if not restricted by express constitutional provisions; and to declare that the external bounds of a State upon the sea coast are limited by those of its counties, is but another form of saying that both depends upon the will of the legislature." (Gould on Waters, 3rd Ed., pp. 27, 28.)

And as said by Marshall, C. J., in *United States* v. *Bevans*, 3 Wheat. 336:

"The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

By the Revised Statutes (Sections 1 and 4, Chapter II, Title 1, Third Edition, Volume 3, pages 1 and 18) concerning the boundaries of the several counties of the State of New York it is provided:

"Section 1. *The State shall be divided into* fifty-six (fifty-nine) counties, called" (then the counties are enumerated, including Kings).

"§ 4. None of the bounds or lines assigned for the limits of any of the said counties, shall be

construed to affect the right or title of any person or *body politic*, or to confirm the bounds or right of any patent whatsoever."

It follows that all the territory of the State of New York is comprised within the various counties of the state. There can be no littoral territory of the state not embraced within the lines of a county, unless otherwise provided by statute. This has been held by the Court of Appeals in *Manley* v. *People*, 7 N. Y. 295, wherein it was said (p. 298-299):

"Section one of title one of chapter two of the first part of the revised statutes (3 R. S., 1) declares, that the state shall be divided into fifty-six counties. This undoubtedly means that the whole state shall be so divided, including the waters and the lands covered with water within its bounds, as will presently be made to appear. Section 2 of the same statute contains a particular description of the extent and boundaries of each of said fifty-six counties.

. . . . . .

"A careful examination will show that every part of the state is located in some one of the counties enumerated in the statute. . . ."

By Chapter 63, Laws 1788 and by the Revised Statutes of New York, it is provided that *"all that part of this state"* bounded easterly by Queens County; westerly by the Hudson River; northerly by the New York County; *and southerly by the Atlantic Ocean* shall be contained in Kings County. Hence it follows *that all that part of* the State on the Atlantic shore of Kings County is within Kings County; the territorial boundary of Kings County being described as the "Atlantic Ocean", the county line in the ocean is coincident with the state line.

The littoral boundary of Kings County is described as the "Atlantic Ocean."

In the absence of any statutory limitation there can be no question but that the littoral boundary of counties and towns extends to the water line of the state. The Court of Appeals has so expressed itself in *Mahler* v. *Norwich & N. Y. Transp. Co.*, 35 N. Y. 352, saying at page 359:

"Even if the statute, in declaring the bounds of the counties bordering on the Sound, had limited them, in terms, to the line of low-water mark, it would indicate nothing but the mere fact that the legislature deemed their extension to the exterior water-line of the state a matter of no practical importance; but *in the absence of any such limitation, we are clearly of the opinion expressed by this Court on a former occasion, that the respective counties and towns, which are bounded generally on the Sound, comprehend within their limits the waters between their respective shores and the water-line of the state.* This is the usual and reasonable rule in the political apportionment of territory, for the purpose of fixing the limits of civil and criminal jurisdiction.

. . . . . .

"The territorial jurisdiction of the state is disputed by no power, either foreign or domestic. Its title is clear, under the decisions of our own tribunals, and equally clear under the rules of international law. We see no reason why it should not be upheld by the courts, as firmly as it has been maintained by the state government."

By describing the littoral boundary of Kings County (Chapter 63, Laws of 1788) as "southerly by the Atlantic Ocean," the Legislature meant a line parallel with and three miles from the shore. When by Chapter 449 of the Laws of 1894, the Town of Gravesend, which was then a part of the shore lands of Kings County, was merged in the City of Brooklyn, the Legislature made no reservation of the "three-mile limit" nor was any such reservation made in the charter of Greater New York consolidating therein the City of Brooklyn as the Borough of Brooklyn.

If the strip of water in the Atlantic Ocean from low-water mark to the three-mile limit were not a part of the City of New York and County of Kings, the anomalous situation would exist of having a portion of the state without municipal control of any character. The United States Supreme Court on this subject has affirmed the following holding:

"The law will take judicial notice of the universal and unvarying practice of our states to subdivide their entire territory into counties, and their counties into municipal districts. *Indeed the existence within a state of any portion of its territory without county or municipal relation is unheard of.* But unless this littoral land of New Jersey is within the county of Hudson and within the boundaries of Jersey City. it is in this anomalous, nonmunicipal relation, for it is not contended it has or *can have any other municipal relation than with Jersey City." Leary* v. *Jersey City*, 208 Fed., 854, 857. Affirmed 248 U. S., 328.

So it was determined that the Atlantic cable companies with operating terminals in New York City, were, to the three-mile limit in the ocean, occupying waters "within the limits" of the state and in making such special franchise assessments the tax commission duly certified them to the tax district of the City of New York. The Supreme Court at Special Term affirmed the assessment in the certiorari pro-

ceeding brought by the Mexican Telegraph Company and the Appellate Division has unanimously affirmed the lower court.

Note: Massachusetts, Rhode Island, California and Texas definitely fix their ocean boundary at the three-mile limit.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

RAILROADS — EFFECT OF GOVERNMENT CONTROL. — In a recent case the Illinois court handed down an interesting opinion construing the federal act relating to federal operation and control of railroads as affecting the right of taxation by the states. The railroad filed its objection to the taxation of cash on hand, claiming that it was not its property but was the property of the United States by reason of the act referred to, and was not subject to taxation by the state. It was held by the court that the taking over of the operation and control of the railroads by the federal government was a temporary war measure; that thereby the railroad did not become an agent of the government for the purpose of carrying into effect the power of the government conferred by the people, at least to the extent that its property was not subject to taxation by the states.

"It would seem," says the court, "from the provisions of section 1 and from the provisions of sections 12 and 15 relating to tax accruals, that it was not the intention of Congress to deprive the states of the power of taxation which was possessed and exercised prior to the passage of the act temporarily taking over, not the *ownership*, but the operation and control of the railroads. The decision of the state tax authorities in assessing the property was approved and the assessment upheld.— *Wabash R. R. Co.* v. *Board of Review*, 123 N. E. 259.

CORPORATION FRANCHISE TAX.—Several cases, decided by the Massachusetts supreme court, arose as an aftermath of the decisions of the Supreme Court of the United States in *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, and *Locomobile Co.* v. *Massachusetts*, 246 U. S. 146. Several of the cases, namely, *International Paper Co.* v. *Commonwealth*, 232 Mass. 7, *Locomobile Co.* v. *Commonwealth*, 232 Mass. 16, and *Lever Brothers Co.* v. *Commonwealth*, 232 Mass. 22, related almost entirely to the interpretation of the statutes giving the court jurisdiction to order a refund of illegal taxes; it being held that there could be no refund except of taxes paid within six months before the bringing of the petition, and that, as fully set forth in the International Paper Co. case, the bringing of a petition within six months involved the taking out of process and the making of a reasonable effort to serve it. When no attempt was made to serve process until long after the six-months period had expired, and then service was had of a new process, it was held there could be no recovery.

The case of *Liquid Carbonic Co.* v. *Commonwealth*, 232 Mass. 19, was really a reargument of the questions involved in *Locomobile Co.* v. *Massachusetts*, 246 U. S. 146. The court expressed itself as still convinced of the view contended for by the Attorney-General, that the two tax statutes, that of 1909 and that of 1914, were entirely independent, separable and severable, but necessarily it followed the decision of the Supreme Court of the United States in *Locomobile Co.* v. *Massachusetts* notwithstanding, and held that a tax of less than $2,000 assessed solely under the statute of 1909 was invalid. An attempt was made to get the Supreme Court of the United States to review this decision on certiorari, but it refused. Accordingly, the result seems to be that all foreign corporation excise taxes paid solely under the statute of 1909 were invalid in all cases where the payment was made between July 1, 1914 and March 18, 1918, while St. 1914, c. 724, was in effect. As a practical matter, however, owing to the decisions in the other cases involving matters of jurisdiction and procedure, the Commonwealth has been required to make but few refunds, since but few petitions were seasonably brought.

In *Lawton Spinning Co.* v. *Commonwealth* the only real question was as to the validity of an excise tax assessed and paid

under the statute of 1909 after the statute of 1914 had been repealed. The court held that this repeal entirely removed the illegal element introduced into the tax system by the statute of 1914, and that, accordingly, an excise tax assessed and paid after that repeal became effective and entirely valid under the decision in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68. No attempt has been made to take this case further. The result is that the repeal of the statute of 1914 on March 18, 1918, placed the excise tax statutes of the Commonwealth in precisely the same condition that they were before the enactment of that statute, and thus, in view of decisions in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, and *Cheney Brothers Co.* v. *Massachusetts*, 146 U. S. 147, they are entirely valid.

The only other point involved in any of these cases is the comparatively minor one decided in *Lever Brothers Co.* v. *Commonwealth*, that the filing fee of $5 required to be paid when the annual certificate of condition is filed by a corporation is entirely valid even though the tax assessed in connection with the filing of this certificate is invalid under the recent decisions at Washington. — *International Paper Co.* v. *Commonwealth* and companion cases, 232 Mass. 7-37; 121 N. E. 510-518.

State Income Tax—Non-Resident—Discrimination.—The initial stage of litigation over the New York state income tax was recently reached in a decision by the United States District Court, holding the provisions of the law which impose a tax upon the income of a non-resident derived from personal services performed, or business transacted in the state, unconstitutional as being discriminatory and hence contrary to section 2 of Article IV of the federal constitution.

The case arose through an action by a corporation employing non-residents in the state, to enjoin the state comptroller from enforcing penalties for failure to withhold the tax from salaries paid to such employees. The state comptroller moved to dismiss the bill on the ground that it did not state a cause of action, which motion was denied upon the ground above stated.

As above indicated, the sole question decided was as to the equal privilege and uniformity clause of the federal constitution and the importance of the opinion lies in the holding that the constitutional limitation in question is applicable to taxation and its reference to the authorities sustaining that position. The discrimination complained of arises from the denial to the non-resident of the personal exemption granted to residents and the requirement that the tax shall apply to the entire income of the non-resident made subject to the tax. The authorities cited on this point include *Corfield* v. *Corgell*, 4 Washington Circuit Court Reports, 381; *Paul* v. *Virginia*, 8 Wall. 168 at p. 180; *Ward* v. *Maryland*, 12 Wall. 418; Cooley, *Const. Limitations*, 16; *Wiley* v. *Parmer*, 14 Ala. 627; *Bliss' Petition*, 63 N. H. 135; and *Sprague* v. *Fletcher*, 69 Vt. 69. Objection to the withholding from income of non-residents when not required in the case of residents, was held not fatal as being a reasonable administrative provision (*Bell's Gap R. R. Co.* v. *Penna.*, 134 U. S. 232). Summing up its conclusions, the court observes that the Fourteenth amendment along with section 2 of Article IV and the commerce clause "have been largely responsible for the community of interest, the unanimity of purpose, the united effort, and the magnificent accomplishment of our people. If now, under one pretense or another, the states are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various states will, for all practical purposes, be burdened with the disabilities of alienage and this would be intolerable." —*Yale & Towne Mfg. Co.* v. *Travis, Comptroller*, published in the New York Law Journal of August 13, 1919.

Tax Commission—Powers—Decision Final.—The extent of the power conferred upon the Arizona Tax Commission by the statute of that state, is discussed in a recent decision, a copy of the opinion in which we have received from the commission. While the point was not necessarily involved, the opinion expressed by the judge writing for the court, which was concurred in by the other judges writing, was that in view of the language of the statute (R. S. Ariz. 1913, Par. 4827) that the decision of the tax commission should be "final except as otherwise provided by law", precluded an appeal to the courts from a decision by the commission fixing the valuation of property.

The question actually decided was as to whether, assuming the assessment to have been made by the county assessor, a proceeding instituted in the superior court in accordance with Par. 4887 was an action or special proceeding *commenced* in that court so as to authorize an appeal to the supreme court. A previous decision (*Mohave Co.* v. *Stevens*, 17 Ariz. 165) apparently squarely denying the right to such an appeal, was overruled, and the proceeding in the superior court was held to be an original one *commenced* in that court and hence appealable. However, as the assessment, while entered by the county assessor, was held to be in reality an assessment by the tax commission, action of the lower court in denying the state's motion to dismiss the appeal for failure to file the same within the time limit, was reversed, the judgment of that court reducing the assessment vacated and the original assessment restored. For this reason the views of the judges above referred to as to the finality of the tax commission's assessment, are *dicta.*

An interview by Commissioner Howe is, in part, as follows:

"The decision of the court upholds every contention of the tax commission as to its powers, and sustains our belief that no appeal can be taken to the superior courts from the action of the tax commission in fixing the valuations of mines. Had the decision of the supreme court been otherwise I fear that we should have seen a return to the old territorial system when each county tried to hold down its valuation, in order to throw as much of the burden of taxation on the other counties as possible."

The possible remedy of a taxpayer is suggested by the dissenting judge as being by certiorari, citing 2 Cooley on Taxation, page 1400.—*State of Arizona et ano* v. *Inspiration Consolidated Copper Company; Do.* v. *International Smelting Company,* 181 Pac. 951, 955.

Valuation Methods—Capitalization of Income — Intangible Property—"Unit Rule"—Injunction.—While the Arizona tax commission experiences clear sailing in the state courts, as indicated by the decision last noted, they recently met disaster at the hands of the United States Circuit Court of Appeals. The case involved an assessment made against the Standard Oil Company, a California corporation, with producing plant in that state and engaged in part in selling its products throughout the state of Arizona during the year in question. The local assessors assessed the physical property of the corporation in the various counties at full value, aggregating the sum of $347,706. The state tax commission, acting under its general authority to supervise and revise local assessments, proceeded to do so in this case. The method adopted was termed by them the "capitalized income" method. Under this method the commission appears to have started with the net income as reported by the company, attributable to the production, shipment and sale of that part of its product sold in Arizona. They capitalized this income at 25 per cent, thus reaching a total value which they called "intangible property" due to "excessive earnings." The amount thus found was $2,910,597. The difference between this figure and the assessment by the local assessors was thus the amount of the "raise", it thus being some raise even for Arizona.

This increase was ordered placed upon the local tax books throughout the state under the heading of "tangible and intangible property . . . based on excessive earnings." Upon this state of facts the company brought an action in the federal court, praying for a temporary injunction to restrain the collection of any tax in excess of that levied upon the value of the real and personal property and that the increase complained of be declared void, upon the theory that the method employed by the tax commission was unauthorized and in contravention of plaintiff's constitutional rights under the federal constitution. The court sustained this contention in every respect, holding that there was no authority in Arizona for the taxation of the earnings of the company nor for the board to judge of what earnings were "excessive" nor how heavily such earnings might be taxed; that intangible property did not ordinarily include things other than franchises, credits and choses in action; that it was impossible to determine at what amount any particular article of property was assessed, the increase being ordered apportioned *en bloc,* based upon gross sales in the county in question. The court quotes from the opinion in the Massachusetts case, *Opinion of the Justices*, 108 N. E. 57, in which they held that the determination of the valuation of property by capitalizing the income,

operated to disturb uniformity and equality and that "if extended to its logical conclusions, it would be difficult to trace any remaining constitutional protection to the taxpayer."

The court held that federal courts are not bound by the section of the Arizona statutes forbidding injunctions against the collection of taxes. It denied the applicability of the "unit rule" of taxation to the assessment of property of this character and distinguished the express cases where such a rule was established by the United States Supreme Court. It held that the method used involved a consideration of income produced by plaintiff's California properties, which were not within the jurisdiction of the Arizona authorities, thus applying a principle inconsistent with the due process provision of the 14th Amendment. The action of the district court in denying the temporary injunction and dismissing the bill was therefore reversed and the cause remanded with instructions to issue a temporary injunction.—*Standard Oil Co.* v. *Howe et al.*, 257 Fed. 481.

Banks. — The application of the Virginia segregation act of 1915 to the taxation of bank shares, was discussed in a recent case and it was held that the taxation of intangibles at the rate of 30 cents per $100 whereas bank shares were taxed at $1.40 per $100 did not constitute a discrimination against national bank shares, repugnant to section 5219 of the United States Revised Statutes, as the purpose of the federal statute was to prevent discrimination by the states in favor of state banking associations against national banking associations. The court quotes at length from a note in 9 U. S. Comp. Stat. (1916), title "National Banks," at page 11993, which, under the heading "Moneyed Capital," discusses the purpose of the section in question and contains numerous citations to decisions supporting the holding in the *instant* case that the claim of discrimination was groundless. — *Richmond* v. *Merchants Nat. Bank of Richmond*, 98 S. E. 643.

Exemptions—Contract with City.—A recent decision by the Virginia court contains an interesting discussion of exemptions as applied to municipal contracts. The predecessor in interest to the party claiming exemption, had bought certain real estate and other property from the city of Manchester (since annexed to the city of Richmond). The purchase price included as part consideration a contract that the city would exempt the real estate and improvements from taxation forever. The sale of the real estate was made under authority of a statute making it lawful for the city to make the sale "by such mode and upon *such terms* as said common council shall deem proper." The exemption from taxation, above described, was claimed to be one of the "terms" of the sale. The lower court held that this exemption was valid and ran with the land.

On the question of the validity of the original contract of exemption the court refers to the necessity of clear and positive power to grant an exemption from taxation and that the words "upon such terms" in the contract above quoted, were insufficient to predicate authority to grant this perpetual exemption.

The remainder of the opinion discusses the right to set off for failure of consideration, assuming the invalidity of the exemption clause and considering the contract as one for consideration for services performed. The observations of the court upon the evils of exemption are particularly wholesome. — *City of Richmond* v. *Virginia Ry. & Power Co.*, 98 S. E. 691.

Public Purpose.—In a suit by the city of Kansas City, Missouri, to require the city comptroller to sign and sell bonds for municipal purposes, an elaborate discussion occurs as to whether the making and selling of ice by the city to its inhabitants is a public purpose. The court holds in the negative with full discussion and exhaustive citation of authorities. — *State* v. *O'Rear*, 210 S. W. 392.

Exemptions — Charitable Organizations.—While the application and disposition of the net proceeds of the business of a charitable publishing establishment, to and for the purpose of aiding traveling and worn-out preachers, is a devotion of the fund to a most worthy charitable purpose, yet the charitable publishing establishment is not such a charitable institution as to bring it within the meaning of the Indiana statute exempting charitable organizations from taxation. — *United Brethren Publishing Establishment* v. *Shaffer*, 123 N. E. 697.

Licenses — Automobiles. — Corporations which own and operate automobiles at their branches may be interested in a recent decision of the Supreme Court of Massachusetts.

The defendant corporation was domiciled in Maine and maintained offices and places of business in Massachusetts and operated a branch in New Hampshire. The car used in connection with the New Hampshire branch, and bearing a New Hampshire license, was in collision with plaintiff's in Massachusetts. The car was not registered in Massachusetts and at the time of the collision was being operated by an employee of the New Hampshire branch without authority, express or implied, from the defendant, and not in the business of the company.

The court held that the defendant corporation was not a non-resident within the meaning of the automobile law, but was subject, respecting all its automobiles within the commonwealth, to the absolute provision against operating them upon the highway unless registered according to the automobile laws of Massachusetts. Had the car been operated in Massachusetts by the authority of the defendant, it would not only have been subject to a fine and rendered liable to heavy civil liability and held responsible for injuries caused by the negligent operation of the automobile, even though the car was not at the time being used by the business of the defendant corporation.

It is interesting, in this connection, to observe the ruling of the New York Court of Appeals in *Fallon* v. *Swackhamer*, 123 N. E. 737, to the effect that the person driving a car at the time of an accident, whether servant or agent, must at the time be engaged in the owner's business or purpose, in order to render the owner liable.—*Gondek* v. *Cudahy Packing Co.*, 123 N. E. 398.

Foreign Corporations—Corporation Franchise Tax — Impairment of Contract—"Authorized" Capital Stock.—In a recent case the Illinois court discusses the question whether a license to do business issued under an act in force at the time, is a contract between the state and the corporation which cannot be changed or modified so as to require the corporation to make further payments, unless by law similar payments are required of domestic corporations. The court held, among other things, that as respects a foreign corporation, licensed in 1901 to do business in the state, laws 1917, p. 306, section 5b, making it the duty of the secretary of state to ascertain the proportion of capital stock actually represented by property and business at the time of the inquiry and imposing an additional tax, was not invalid, as violating the corporation's contract, discriminating against foreign in favor of domestic corporations, denying the equal protection of the laws, taking property without due process of law, or as constituting a burden upon interstate commerce. The fee was held properly fixed upon the basis of the capital stock authorized to be issued instead of being limited to the issued capital stock.—*American Can Co.* v. *Emmerson*, 123 N. E. 581.

Exemptions — Cemeteries — Fraternal Organizations. — In construing the Indiana statute in relation to exemption of cemetery corporations the supreme court of that state limits the exemption to cemetery associations or corporations incorporated under the laws of that state. A fraternal organization which buys a tract of land and causes it to be laid out and platted as a cemetery, sets aside 25 per cent of the proceeds derived from the sale of lots as a perpetual care and maintenance fund, and from the sum so set aside, purchases real estate and erects a three-story building, the rents and profits derived from which are also set aside as a perpetual care and maintenance fund for the cemetery, is neither a cemetery association nor a corporation organized under the laws of the state for the purpose of owning and maintaining a cemetery; nor is the property in question set aside for charitable purposes.—*Le Fontaine Lodge* v. *Ediston*, 123 N. E. 468.

Net Income—Deduction for Excess Profits Tax. — Under the New York act taxing the net income of business corporations, the income taxed is declared to be the same as that upon which a tax is paid to the federal government. Relator undertook to deduct from the total net income the excess profits tax paid the federal government within the year, and contended that the balance should be used as the basis for the computation of the New York tax.

The tax commission computed the tax to be paid by the relator upon the basis of its total net income as shown by its return to the federal government, and refused to credit the amount of the excess profits tax. The crux of the decision is covered by the statement in the opinion of the Court of Appeals that "It should be borne in mind that we are to reach the correct apprehension of the net income which the statutes require to be returned or reported to the United States Treasury Department, and not of the amount those statutes require the tax to be paid upon." It was held that the fact that certain credits may be taken or certain deductions made in order to determine to what extent the income as returned, may be taxable, does not change the net income. A part of it equal to the sum of the excess profits tax is not in such case taxed. Corporations which are not assessed the excess profits tax are assessed upon the entire net income. It is clear that within the legislative intention, the net income is that returned in accordance with the federal statutes. The amount of the excess profits tax cannot be deducted in computing the state franchise tax levied under the act (Tax Law, Art. 9A).—*People ex rel. Barcalo Mfg. Co.* v. *State Tax Commission*, 124 N. E. 107. (See Bull. IV, 242.)

Apportionment of County Taxes.—In an action by certain towns in a county against the county and other towns for relief, alleging that said towns, through error of the county treasurer, were required to pay to the county more taxes than they were legally required to pay, resulting in defendant towns paying less than they should have paid, correction through reassessment will not be made unless relief is applied for, so promptly as to be effective before substantial change occurs in the proportions of taxes assigned to the towns. An assessment according to the proportions in effect when the tax was laid will not be ordered when the valuations in some towns are less than when the proportion was established.—*City of Keene* (*N. H.*) v. *Cheshire County et al.*, 106 Atl. 486.

Inheritance Tax—Vested Estate.—A transfer tax can be legitimately imposed upon property which has already been made the subject of a deed of trust, when such deed does not operate to transfer the title to the property until after the tax act becomes effective. The New Jersey act (P. L. 1914, p. 267) imposing a tax upon such property held not unconstitutional as diminishing the value of vested estates impairing the obligation of a contract or taking private property without compensation.—*Carter* v. *Bugbee*, 106 Atl. 412.

Inheritance Tax — Stock on Non-Resident Stockholder. — Capital stock represents the interest of its owner in the corporation and the rights of such owner rest on the laws of the state which created the corporation. A transfer by will of the capital stock of a domestic corporation is subject to the inheritance tax of the state although the testator was a non-resident and kept the certificates outside the state. The courts can acquire jurisdiction of the corporation by service of process therein. Where a domestic corporation is incorporated only in one state, the tax under the Minnesota statute (G. S. 1913, sec. 2281) is to be computed on the full value of the stock although the properties of the corporation be situated in several states.—*State* v. *Probate Court of St. Louis County*, 172 N. W. 318.

Organization Tax on Corporations—Increase in Powers. — Under the Kentucky statute the amendment of articles of association of a corporation merely increasing the capital stock was not such an "increase in its powers" as made it liable for organization tax on its original capital upon which no organization tax was required to be paid at the time of organization.—*Greene* v. *Louisville Ry. Co.*, 211 S. W. 418.

Intangible Personal Property—Situs. — Promissory notes deposited with the state treasurer of Texas at the state capitol by an insurance company domiciled in another county held to have acquired a situs where deposited and a statute (Rev. St. 1911, art. 4749) fixing the situs for taxation at the home office of the company in the other county held repugnant to sec. 2 of art. 8 of the constitution requiring all property to be assessed for taxation where situated. The Texas decisions reviewed and held to classify notes as tangible personal property "like cattle, horses or sheep." — *City of Austin* v. *Gt. So. Life Ins. Co.*, 211 S. W. 482.

License—Interstate Commerce. — A Missouri corporation obtaining orders for ranges in Louisiana, through drummers who carried sample ranges with them, and shipping such ranges to a Louisiana agent for delivery, was held, following *Crenshaw* v. *Arkansas*, 227 U. S. 389, engaged in interstate commerce and not subject to a state license tax. — *Ballard* v. *Range Co.*, 81 So. 429.

License — Tank Cars. — The license tax imposed by sec. 46, ch. 6241, Laws of Florida, 1913, upon a corporation "owning, controlling or operating tank cars" construed as not applicable to a corporation engaged in the oil business which owns and uses tank cars for the sole purpose of transporting its own products.— *Texas Co.* v. *Amos*, 81 So. 471.

Corporation License Tax — Manufacturing Company — Interstate Commerce.—Another discussion by the United States supreme court of the effect of license taxes upon business, is to be found in a recent case arising in Missouri. The city of St. Louis, pursuant to authority of a state statute, imposed a tax upon manufacturers based upon sales of their product. The state court (198 S. W. 1183) upheld a computation by the officials based upon sales which included sales made of goods sold from a warehouse outside the state. This was contested as burdening interstate commerce. The state court held the tax to be upon the *manufacture* measured by all sales wherever made. The supreme court, accepting this construction as conclusive, found that the "practical operation and effect" of such construction did not result in depriving the plaintiff of rights secured by the federal constitution. The power of the city to impose a tax upon the business of manufacturing was held undoubted (*Clark* v. *Titusville*, 184 U. S. 329; *St. Louis* v. *United Rys. Co.*, 210 U. S. 266, 276). "The city might have measured the tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not and have required payment as soon as, or even before, the goods left the factory." The taxing ordinance was held to impose a legitimate burden upon the business of manufacturing, to produce "no direct burden on commerce and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other general contribution to the cost of government." Nor was it held to impose in effect a tax upon property or business transactions outside the state and thus to deprive plaintiff of its property without due process of law. The recent decisions in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, and *Looney* v. *Crane Co.*, 245 U. S. 178, were held "obviously distinguishable." — *American Mfg. Co.* v. *St. Louis*, U. S. Sup. Ct., June 9, 1919; 250 U. S. —.

Federal Stamp Tax — Validity of Unstamped Instruments. — In a recent Mississippi case the court, in sustaining an injunction to prevent the sale, on execution, of land transferred by the debtor before the judgment upon which the sale was ordered, but not recorded until afterwards, because of absence of stamps, held that the formalities to be observed in the making and recording of a deed to real property, was a matter for regulation by the state and not the federal government; that the internal revenue laws providing that unstamped instruments shall be invalid and not subject to record, have no application thereto, citing note to *Garland* v. *Gaines*, 84 Am. St. Rep. 193.—*Sowell* v. *Rankin*, 82 So. 317.

Special Assessments. — Special assessments can only be levied to pay for an improvement local in character as distinguished from general, and the proceeds of such assessments cannot be used to augment the general revenue fund or for general purposes. Power to make assessments is given as a means of paying for a particular improvement or benefit to the property assessed and when the necessary funds are raised otherwise, as in the instant case, by general taxation, and the improvements made and paid for, there remains no need for a special assessment and no power to make one.—*City of St. Cloud* v. *Carlson*, 82 So. 616.

Inheritance Tax — Computation of the Tax. — Under the Connecticut act (Gen. St. 1918, sec. 1264) the rate of tax applicable to a given class of beneficiaries was held to be ascertained by applying it to the total amount giving to the entire class and prorated to each beneficiary in

the class and not to the estate going to each individual beneficiary. — *Curtis* v. *Corbin,* 107 Atl. 606.

Inheritance Tax — Collection in Foreign State. — The state of Colorado cannot maintain an action in New York to recover an inheritance tax on an estate of one of its citizens dying in that state, in the absence of a specific authorization to do so by the tax laws of Colorado.

An order in an action fixing inheritance tax, obtained in Colorado, on other than personal service, if a judgment, is *in rem* and can only be collected out of property found in that state belonging to decedent. An inheritance tax is not a debt and is not founded on contract, express or implied, upon which a suit may be predicated.— *Colorado* v. *Harbeck,* 175 N. Y. Supp. 685.

Classification—Constitutional Provisions—Uniformity. — In a recent case the provisions of the recently enacted classification law of Montana (L. 1919, ch. 51) are exhaustively reviewed in an elaborate opinion which for its sympathetic and thoroughly practical discussion of the bearing and effect of fundamental constitutional provisions respecting the power to tax and to classify, may well receive thoughtful consideration by other states seeking to free themselves from the fetters contained in their constitutions.

The case arose by an action by a county treasurer, seeking to enforce the collection of taxes upon full value of property classified under the act in question for taxation at 20 per cent of full value. It involved the interpretation of various sections of article 12 of the state constitution, principally sections 1 and 11 which it was claimed should be considered as relating to different subjects and should not be read together. The former section as construed by the court, was held to lay down a rule of uniformity and the latter to modify that rule by permitting the classification in question.

In the course of the opinion, the court traces the history of constitutional provisions and discusses with marked ability the trend away from the old rule of uniformity and from property as such, to property in proportion to its use, productivity, utility and its general setting in the economic organization of society.

Such questions of immediate and widespread interest to all students of taxation, as the meaning of the terms "uniform," "assessment," "taxation," "subjects of taxation," "the same class of property," which frequently come up for consideration in construing constitutional clauses, are discussed in a helpful manner, with elaborate reference to precedents from the decisions of the United States supreme court. We observe with particular interest, a reference to the address of Professor Bullock before the third conference of this Association.

The court found the classification act free from all conflict with the state constitution and also with the due process clause of the federal constitution which was also urged against it and sustained the tax as levied upon the 20 per cent valuation.— *Hilger* v. *Moore,* 182 Pac. 477.

Exemptions — Classification of— Discrimination. — The "uniformity" clause of the Idaho constitution (Art. 7, sec. 5) was the subject of an unusual claim in a recent case in which it was urged that that clause required uniformity in exemptions. A statute exempted motor vehicles from taxation when operated upon the highways, upon payment of registration fees, while motor vehicles operated by dealers for testing and demonstration were not required to be so registered. The state constitution permitted exemptions. Appellant, a dealer, contended that because automobiles upon which registration fees had been paid, escaped taxation under the property tax, those in the hands of dealers must also be exempted. The court found it unnecessary to pass upon the constitutionality of the exemption granted, but held that no implied exemption for automobiles of dealers existed. — *Kootenai County* v. *Seven-Seven Co.,* 182 Pac. 529.

Value — Reproduction Value — Assessment as Evidence of Value.—In an eminent domain proceeding the court held that evidence of the reproduction cost of buildings was competent to prove the market value of the land, as enhanced by the buildings; also that evidence of the owner's return of the value of the property for tax purposes was competent.—*Mayor &c. of Balto.* v. *Himmel,* 107 Atl. 522.

Banks—Deductions. — The Nebraska bank tax law (Rev. St. 1913, Sec. 6343; L. 1915, Ch. 108) was interpreted in a recent decision and held to impose a tax upon the shares of stock in the hands of the stockholders and not upon the property and assets of the corporation. The words "capital stock" were held to mean the shares and not the capital stock in the aggregate. In applying the statute, the fact that the value of United States obligations was not deducted in ascertaining the value of the shares, did not render the tax unlawful. — *State* v. *First Nat. Bank of Aurora,* 171 N. W. 912.

Savings Banks—Interest Received—Construction by Officials.—The tax in Maryland upon mortgagees or assignees holding mortgages on real estate, of 8 per cent on the interest covenanted to be paid (Ch. 516, Acts of 1916) and the tax on interest on judgments at the same rate (Ch. 508, Acts of 1916), though general in their terms and apparently applicable to all within the class, were held inapplicable to such interest received by savings banks whose stock was taxed. It appeared that no attempt had been made to tax such interest for the more than twenty years which had elapsed since the original law was enacted, and it was held that the unvarying construction by the taxing officials should not be disregarded "except upon the most imperious grounds."—*Hess* v. *Westminster Savings Bank,* 106 Atl. 263.

Banks—Uniformity—Evidence—Injunction. — Under the constitution and statutes of Utah, taxation is required to be uniform upon all property within the jurisdiction of the authorities levying the tax (Const., art. 13, secs. 2, 3; Comp. Laws 1907, secs. 2508, 2509, 2511, 2505 subd. 5). Complainant, a national bank, sought to enjoin the collection of a part of the tax assessed upon its shares of capital stock upon the grounds that the assessment was not uniform with other property; was discriminatory, and that the assessor had adopted wrong methods in valuing the shares. The bank claimed that the correct method of valuation of the shares was the net asset value and not the market value, the method adopted by the assessor. It further claimed that the statute in question (sec. 2509) required the deduction for real estate to be at the same proportion of the total value found for the shares, as the assessed value of the real estate bore to the book value of the shares. The assessor had deducted the real estate at its assessed value. As evidence of the discrimination, the bank sought to introduce the report of the special Commission of 1911, which purported to contain the result of its investigation as to the rates of assessment throughout the state.

The court held that the assessor's method of valuation at "market value" was correct and rejected the claim for net asset value; it held that the method of deduction for real estate claimed by the bank was correct instead of the assessed value, used by the assessor, but as the value of the stock as found could have been made higher, regardless of this error, the bank could not complain. The findings of the special commission were rejected as being hearsay. No substantial ground was found for the granting of injunctive relief, as this remedy should not be invoked "except in clear cases, based upon unquestioned facts, coming within the clear terms, letter and spirit of the statute." In conclusion, the court expresses its "gratification to know that the illogical, incongruous and unauthorized method of assessing property for taxation purposes in this state prior to 1916 has been abandoned and the more legal and rational method of assessing property at its actual value adopted." —*Continental Nat. Bank* v. *Naylor,* 179 Pac. 67.

Licenses—"Revenue Measure."—An ordinance which imposes a license tax greatly in excess of the probable amount necessary to issue the license, inspect and regulate the business, is a revenue measure and void under the provision of a city charter which prohibits the levying of an occupation tax for general revenue purposes. Equity by injunction will interfere to prevent the enforcement of an illegal and oppressive ordinance where it is made to appear that valuable property rights are invaded and irreparable injury will result from its enforcement. — *City of Tulsa* v. *Metropolitan Jewelry Co.*, 176 Pac. 956.

Railroads — Method of Valuing Franchise.—In a recent case it was held that, under §§ 4079 and 4080 of the statutes of Kentucky, the mode of finding and

fixing the value of the franchises of a railroad, organized under the laws of Kentucky, was to fix the value of the capital stock by capitalizing the net income derived from business within the state, and from the amount thus fixed, to deduct the assessed value of all tangible property assessed in the state, the remainder thus found being the value of the corporate franchise subject to taxation.—*Bosworth et al. v. Kentucky Highlands R. R. Co.*, 210 S. W. 671.

BOOK NOTICES

The Taxation of Corporations and Personal Income in New York. Henry M. Powell. Clark Boardman Co., Ltd. New York, 1919.

In this book Mr. Powell has covered much more than the recently enacted corporation income and personal income tax laws of New York. He has presented an up-to-date discussion of the entire subject of corporation taxation under all existing laws in that state. This is particularly helpful, as the statutes in existence prior to those above mentioned, and which continue in effect as to important classes of corporations, are complicated in the extreme. These are definitely explained, with reference to the latest decisions and with discussion of the effect of the later enactments.

Furthermore, his discussion of the income tax acts of New York necessarily includes a reference to the general questions involved and thus will be found of importance to those in many other states where the subject is receiving attention.

To the New Yorker, concerned with the interpretation of New York's tax laws, the book will be found of practical value not only from its discussion of existing law as interpreted by the courts, but from its helpful suggestions as to the meaning and effect of the provisions in the recent acts which necessarily present obscurities which the individual or corporation must solve in the practical compliance with their provisions.

The scope of the book is indicated by the following summary of its contents:

Part I deals with the general corporation tax law of the state other than the income tax acts. The subject is covered in ten chapters, dealing with the various kinds of taxes.

Part II, consisting of nine chapters, deals with the new business corporation income tax enacted in 1917 as amended in 1918 and 1919, designated as Article 9-a of the Tax Law.

Part III contains in three chapters a discussion of administrative features applicable to the collection and review of taxes generally, with an important chapter on review by *certiorari*.

Part IV describes the new personal income tax law of 1919, known as Article 16 of the Tax Law. The eight chapters contain discussions of the text of the law, its constitutionality, its obscurities, its bearing upon the prior law, and include a table showing in parallel columns the similar sections of the federal law and this law, and the text of the act with applicable federal regulations.

The book closes with a reproduction of the official forms issued by the state comptroller and the state tax commission; forms for use in certiorari proceedings; a table of cases, and indexes.

REPRINT OF PROFESSOR POWELL'S ARTICLES

The volume of reprints of Professor Powell's articles in the *Harvard Law Review*, which was mentioned in a previous issue (BUL. IV, 226), was issued during the summer and a large number of members have availed themselves of the opportunity to secure this valuable reference book. A few copies are still available, which should be applied for at once. The circular we issued describing the volume is here reproduced for the information of members who may wish to use it in preparing an index to the volume:—

JUST ISSUED BY THE NATIONAL TAX ASSOCIATION.

A reprint of Professor Thomas Reed Powell's important articles on *Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, heretofore published in recent numbers of the *Harvard Law Review*.

Professor Powell's style is peculiarly free from heaviness and his lively comment and discussion of the perplexities of our great Justices in dealing with these questions, sparkle with keen humor, rendering the articles distinctly entertaining as well as instructive.

The question is considered under two main heads: the taxes which are an interference with federal instrumentalities and those which are an interference with inter-

state commerce. These subjects are illustrated by separate treatment of the various possible kinds of taxes, showing the variations in the tests of constitutionality as displayed in the several phases in which they present themselves. The text is fully amplified by copious references to the pertinent decisions of the supreme court, so that the volume will really be an effective digest of all the important cases bearing upon this subject.

At no time in the development of constitutional law as it relates to taxation has there been seemingly greater confusion, and hence greater need for constructive criticism and analysis such as Professor Powell furnishes in these notable articles.

The table of contents follows:

I. Interferences with federal instrumentalities.
  1. Taxes on privileges.
  2. Taxes on property.
  3. Taxes discriminating against federal instrumentalities.
  4. Summary and conclusion.
II. Regulations of interstate commerce.
  1. Taxes discriminating against interstate commerce.
  2. Taxes not discriminating against interstate commerce.
    A. Taxes on privileges.
      a. The doctrine of unlimited power.
      b. Modification of the doctrine of unlimited power.
      c. State decisions subsequent to the Western Union case.
      d. Recent supreme court decisions on California and Massachusetts statutes.
    B. Taxes on property.
    C. Taxes on acts, occupations, or income.
      I. Taxes measured by gross receipts.
      II. Taxes on net income "as such."
      III. Taxes not measured by income.
III. Summary and conclusion.

This reprint of 300 pages is sold to members of the Association at $1.00 net; to non-members, $2.00. It is necessary for members to place their orders at once because the number of copies available is limited. While we shall endeavor to give members the first chance to secure this book, prompt action is a necessity.

THE NATIONAL TAX ASSOCIATION

OFFICERS

NILS P. HAUGEN, Chairman Wisconsin Tax Commission, *President*

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

VOLUMES OF PROCEEDINGS. The volumes of proceedings, covering conferences held annually beginning in the year 1907, contain a large amount of practical up-to-date comprehensive information on all phases of taxation. The volumes are cloth-bound, fully indexed, and contain approximately 500 pages each.

PRICES. Annual membership dues in the Association, including the current volume of proceedings, and one year's subscription to the BULLETIN, $5.00. Back volumes to members, $1.00. The current volume to non-members, $3.00. Back volumes, $2.00. Address orders and inquiries to A. E. HOLCOMB, Treasurer, 195 Broadway, New York, N. Y.

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FEDERAL BUDGETARY REFORM

There is one solid fact upon which all are perfectly willing to agree. This is the need for economy. Nothing can obscure the force of this appeal. We recall the final conclusions of a group of British officials who recently visited this country in an effort to check up our tax proposals with the experience in England and to ascertain what might be done to meet the situation there which, we may remark, is appreciably more desperate than ours. At the conclusion of a conversation with the writer, which involved the examination of about every source of taxation available in either country, one of these officials observed somewhat in despair, "What England has got to do is to find some way to reduce expenditures." Governor Smith of New York, in a recent interview, said that if the state income tax rate was to be kept where it is, to say nothing of reducing it, there was need for the "utmost economy in appropriations and efficiency in control." This is about the sum of the matter at present and it applies to the United States and to the states. There must be a much greater regard than has ever been given, to the expenditure side.

This leads us to our immediate object, which is to direct the thoughts of the members of this Association to one tangible measure of relief available which it is peculiarly within our power to promote. We refer to the important movement for budgetary reform in federal expenditures. As is known, a bill has been passed by the House of Representatives containing many of the essentials and which is a long step in the right direction. This bill has gone to the Senate where hearings will be held as soon as the pending questions are disposed of. It is essential that the members of Congress be made aware of a real demand by their constituents for the speedy enactment of this legislation, and it is most appropriate that the members of this Association should take a pronounced stand in its favor.

A committee has been formed to present a report on behalf of the Association and that committee will doubtless be given a hearing before the Senate committee. But this is not all that we can do. Each member can and should personally write a letter to his senator or congressman, or both, giving, if nothing more, his indorsement in general of the plan to have a business-like handling of public funds in lieu of the

present hit-or-miss, guess-work, slovenly methods. It is not necessary to deal with the technical phases or to take a position on the controversial points of budgetary procedure. It is sufficient to register a definite protest against the continuance of present methods, leaving it to the students of the subject and those who have the drafting of the bill in hand to devise the precise form of the measure.

We claim to be and are the only national body interested in fiscal affairs. Beyond doubt our past record entitles us to command the attention of Congress, and it seems certain that if each of our thousand or more individual members would lay aside any personal hesitancy which we may have, and do this simple act, the cumulative effect would hardly fail to be an important factor in influencing the members of Congress to carry to completion this legislation which is of such supreme importance at this time.

We are fortunate in having ready access to the Congressional committees. E. B. Howard, a member of the Association, formerly state auditor of Oklahoma, is a member of the Select Committee on the Budget of the House of Representatives, of which James W. Good of Iowa is chairman. Senator Medill McCormick of Illinois, chairman of the Senate Select Committee on Budget, is also a member of the Association.

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J. HAROLD WICKERSHAM,
Business Manager.

Sworn and subscribed before me this 27th day of October, 1919.

CHAS. E. LONG,
[SEAL] Notary Public.
(My commission expires Jan. 21, 1923.)

MEMBERSHIP NOTES

The secretary was pleased to receive a visit recently from Commissioner Donley of Manitoba and Hon. E. M. Wood, chairman of the provincial commission. They have visited the states in connection with the preparation of a report on readjustments in the taxation system in the province. They have under consideration a business tax based upon gross receipts by which we are doubtless to understand what we would call the license taxes which obtain in many of our southern states, based upon gross purchases or gross sales.

They are also interested in the study of our administrative methods and particularly in our tax commission system.

Three representatives of the British Inland Revenue Department have recently visited this country, collecting information on the operation of our income and profits taxes in connection with proposed changes in the revenue laws of Great Britain.

Mr. Robert Murray Haig has returned from England, where he investigated the operation of the British income and profits taxes under the auspices of the American Economic Association.

Professors Plehn and Seligman are to exchange professorships during the coming year.

Commissioner Leser of Maryland announces his membership in the firm of Hill, Randall and Leser, formed for the general practice of the law, with offices in the Keyser Building, Baltimore.

We note the resignation from the Treasury Department of Luther F. Speer, formerly Deputy Commissioner of Internal Revenue and more recently a member of the Advisory Tax Board. Mr. Speer will be remembered as very largely concerned in the reorganization of the Internal Revenue Department in consequence of the imposition of the income tax law of 1913 and may fairly be given a large share of credit

for the successful establishment of the law under the difficult conditions which then obtained. He has resigned to enter upon private practice with offices in the Colorado Building, Washington.

Commissioner Galloway of Oregon, whose resignation was noted in the October BULLETIN, is succeeded as commissioner by Mr. Frank K. Lovell, formerly secretary of the commission.

We note with deep regret the death, on October 18, of Mr. Frederick N. Judson of St. Louis. Mr. Judson's preeminence in the field of taxation is too well known to require statement. His interest in the Association has been constant and helpful. Those who attended the Chicago conference will recall his admirable paper on "Some constitutional aspects of taxation," perhaps his last public utterance on a subject with which his name will always be closely associated.

We are pleased to note the success at the polls of Mr. Frank Roberson, who was elected Attorney General of Mississippi to take office January 1, 1920. Mr. Roberson has been an effective advocate of tax reform in this state.

Judge Thomas has resigned from the Louisiana state board of affairs and has accepted appointment as state bank examiner. Commissioner T. M. Milling becomes chairman of the board. Mr. O. M. Wright has been appointed a member of the board to fill the vacancy.

Mr. W. W. Beck, a member of the Maryland commission, has been appointed chairman to succeed A. P. Gorman, Jr., deceased, and Mr. J. Enos Ray, Jr., has been appointed a member to fill the vacancy.

Charles A. Andrews, one of our most valuable members, formerly Deputy State Tax Commissioner of Massachusetts and now treasurer of the Gorton-Pew Fisheries Company of Gloucester, Mass., has just been elected president of the important and influential organization known as the Associated Industries of Massachusetts.

Word has just come to us of the appointment last July of J. W. Thatcher as state tax commissioner of Washington, succeeding C. R. Jackson in that office.

As noted elsewhere in this issue, Mr. Philip F. Bross has been appointed Secretary of the newly established Department of Finance of Nebraska, which constitutes in reality a fairly well-equipped tax commission.

LEGISLATIVE AND NEWS NOTES

A committee on Review and Appeal has been established in the Internal Revenue Department to take over the functions exercised by the Advisory Tax Board which was abolished October 1st. Mr. P. S. Talbert, heretofore head of the Technical Division of the Income Tax Unit, has been selected as chairman of this committee, which will be composed of a number of the most experienced men in the department.

Professor Miller advises that no tax legislation was enacted at the recent special session of the **Texas** legislature. He advises further that widespread dissatisfaction with the unequal valuation of property in that state has prompted a movement, inaugurated in San Antonio, to form a state Tax Equalization Association, for the purpose of creating sentiment to secure a state board of equalization. The various counties are to be asked to form associations of taxpayers which will be units of the proposed state association. It is to be hoped that Professor Miller's use of the term "state board of equalization" does not signify that its purpose is to be thus limited, but that in reality a state tax commission will result.

State treasurer Hoyt of **Iowa** advises that little tax legislation of consequence was enacted at the 1919 session. A few bills were passed relating to soldiers' exemptions and one which allows banks and trust companies to deduct from their as-

sessed valuation the amount of government bonds actually owned by them for a period of more than sixty days prior to December 31st.

Commissioner Jones of **South Carolina** advises that the legislature of 1919, pursuant to a recent amendment of the constitution, enacted a law authorizing cities and towns to levy special assessments for the purpose of making permanent street improvements. It also authorized the rebating of county poll and road taxes and municipal street taxes of soldiers until January, 1920.

Tax Commissioner Wallace of **North Dakota** writes as follows of the results of the recent energetic administration of the low flat rate tax on intangibles:

"In 1918, exclusive of money and credits, the total assessment of the state was $403,422,258, and the money and credits assessment was, in round numbers, $102,000,000. This assessment was based upon a law which did not provide an assessment at full value of any kind of property. Under the new schedule, the total assessed value of the state reached the sum, exclusive of the assessment of money and credits, of $1,514,000,000, the latter assessment being approximately $115,000,000. Special attention is directed to the success in assessing the latter kind of property under a low flat rate. Under the general property tax, the assessment of money and credits was a total failure. In 1917 under the local rates, the assessors found $1,250,000; in 1918 under the new law with the low flat rate, the amount assessed reached $102,000,000, while in 1919 it has already, as above indicated, reached $115,000,000, and the assessment is not yet completed."

He also notes the following legislation enacted at the 1919 session, in addition to that contained in the May BULLETIN:

"A law was passed providing for a tax on the gross sales of oil. This law places a much higher rate on mixtures and substitutes than on straight-run gasoline or other pure products. The statute was at once attacked by the Standard Oil Company, which sells a product taxed as a substitute for gasoline. The case is now pending in the federal courts. This law was calculated to produce approximately $400,000 a year in taxes. Immediately upon the law's taking effect, the Standard Oil Company gave notice that it had raised the price of its products to cover the tax, and now, after having collected the increase from its patrons, it refuses to pay the same over to the state.

"A new inheritance tax law was passed, following closely the former law. The principal changes are a lowering of the exemptions and an increase in the rates. The former law was working satisfactorily, having been tested and upheld by the courts, but it was thought advisable to increase the revenue from this source.

"The legislature changed the taxing department from the control of a commission to that of a commissioner and greatly increased his powers as well as his duties. The new taxation laws provide that the tax commissioner shall administer them.

"On account of the increased assessed valuation, the legislature restricted the amount which might be raised by local taxing subdivisions and also restricted the increase in the debt limit. In 1918, the state levy was 4.3 mills. In 1919, for the same purposes, the levy is fixed at 2.47 mills.

"The legislature provided a bonus for the soldiers of the world war, and directed the state board of equalization to levy a half-mill tax for that purpose. This will raise about $800,000 to be given to the returned soldiers to be used in building a home or to be spent in acquiring an education."

Professor Johnson of **Georgia** advises that the recommendations of the special legislative commission, the activities of which were noted in the May BULLETIN, other than that relating to the change in the inheritance tax law, were not acted upon at the recently adjourned session of the 1919 legislature. His further notes are as follows:

"The occupation and franchise taxes cover twenty-eight pages. A few additions were made to the list of occupations taxed and the taxes on several were increased.

"The general tax on insurance premiums was raised from 1 to 1½ per cent. The tax on those insurance companies having one-fourth of their assets invested within the state was raised from ½ to 1 per cent of gross receipts, and on those having three-fourths of their assets so invested

from $^1/_{10}$ to $^1/_4$ of 1 per cent. (The special tax commission had recommended that all insurance companies be taxed at the same rate.)

"The state tax commissioner was authorized to employ, upon recommendation of the governor, a competent person, vested with the authority now given to county boards of assessors, whenever he believes that the regulations respecting the taxation of property and of occupations are not being properly observed. The compensation is to be a percentage of the taxes which the new officer brings into the state treasury, the rate of percentage to be fixed by the tax commissioner and approved by the governor.

"The law provides that the tax commissioner shall visit each county during the course of the year. As the number of counties exceeds 150, this has been impossible and compliance with the law has never been attempted. On his own motion commissioner Fullbright has been calling into conference the tax officials of six or eight adjoining counties for a session of one day. Considerable interest has been shown and the commissioner feels that permanent good will be accomplished.

"Under the new motor vehicle law, every automobile for carrying passengers, of not exceeding 23 horsepower, is taxed $1125. per annum. For every additional horsepower the tax is increased 60 cents. The tax on non-passenger-carrying motor vehicles or trucks ranges from $15 for those having a capacity of one ton or less to $1125. on those having a capacity exceeding seven tons. The proceeds of the motor vehicle tax are to be used in repairing and constructing public roads.

"Under the former inheritance tax law a rate of 1 per cent was collected on transfers to father, mother, husband, wife, child, brother, sister, wife or widow or a son, of the decedent with an exemption of $5,000. Upon all other transfers the tax was 5 per cent.

"Under a new law the primary rates (when taxable value does not exceed $25,000) are as follows: Transfers to wife, husband, child, son-in-law, daughter-in-law, lineal descendant or lineal ancestor of the decedent — 1 per cent; to brother or sister or stepchild of the decedent—3 per cent; to uncle, aunt, nephew or niece—5 per cent; to one of other degree relationship—7 per cent.

"Upon that part of the transfer in excess of $25,000 and up to $50,000 the rate is one and one-half times the primary rate; between $50,000 and $100,000, two times; between $100,000 and $500,000, two and a half times; in excess of $500,000, three times.

"An exemption of $5,000 is made of property passing to widow, widower, child, son-in-law, daughter-in-law of the decedent; and of $2,000 to all others in that class of relationships for which the tax is 1 per cent.

"The tax does not apply to transfers to educational, religious, or charitable institutions.

"The new law applies to all property within the state belonging to inhabitants of the state and to all real estate and tangible personalty within the state belonging to those who are not inhabitants of the state.

"Under the old law all property of whatever kind within the state was subject to the tax without reference to the domicile of the decedent, and thus a step towards interstate comity has been taken.

"Some minor changes were also made in the administrative provisions."

Commissioner Jess of **New Jersey** writes as follows of the activities of the special tax commission, the appointment of which was noted in the June BULLETIN:

"The commission has conducted public hearings in the chief cities of the state. These hearings have been very largely attended and many important suggestions have been offered along the line of tax reform. The two most radical recommendations which have been submitted and earnestly urged for consideration, are that an income tax be substituted for the personal property tax, and that improvements be taxed at a lower rate, or at a lower valuation, than the rate and valuation applied to land. Another important recommendation is that machinery used in manufacturing be exempted from taxation. It is likely that all of these recommendations will have serious consideration.

"The principle of the income tax has already been adopted in New Jersey in a modified form by the passage of the so-called Gross Receipts Tax Act. This act

applies to street railway, gas, electric, heat and power corporations, and provides that the gross receipts of such corporations shall be taxed at the same average tax rate of the state which is applied to certain property of railroad corporations. This tax takes the place of the tax on personal property heretofore assessed in the several taxing districts against the public utilities specified, the personal property thus exempted from the property tax being all railways, tracks, rails, ties, lines, wires, cables, poles, pipes, conduits, bridges, viaducts, machinery, apparatus and equipment, notwithstanding any attachment thereof to lands or buildings, held and owned by any such corporation. The tax is assessed by the state board and apportioned and collected by the taxing districts, in proportion to the value of the property located therein.

"As in other states, the practical operation of the general property tax has not worked out satisfactorily in New Jersey, so far as the assessment of personal property is concerned, and there is, among taxing officials and other authorities who have studied the subject, a strong sentiment in favor of the substitution of an income tax.

"The housing problem has become very acute throughout New Jersey during the past year, and the commission has been urged to consider whether this problem may not be solved, in part at least, by means of the taxing process. The commissioner of revenue and finance in one of the leading cities of the state recommended that legislation be drafted which would permit cities to exempt from taxation, for a period of years, all new dwelling houses. It is questionable of course whether such legislation would stand the constitutional test, since the state Constitution requires that property shall be assessed under general laws and by uniform rules, according to its true value.

"It is the purpose of the tax commission to work out a general scheme of taxation, and after further public hearings, to recommend the proposed plan to the legislature at its next session. The commission will have before it the model system of taxation recommended by the National Tax Association, and it is not unlikely that some of the features of that plan will be incorporated in the bill to be submitted to the legislature."

We have not heretofore noted the partial abandonment by **New York** of the policy adopted in 1911, of confining its inheritance tax to the tangible real and personal property in the state of both residents and non-residents and to the intangible property of residents only. In 1916 securities of real estate corporations and interests in partnership businesses owned by non-residents and capital invested in business by non-residents were made taxable. At the recent 1919 session all property of residents, wherever located, was made taxable, as were shares of stock of all domestic corporations, of national banks located in the state; and securities, including mortgages of foreign corporations, when represented by real estate located in the state, owned by non-residents.

The insistent demands for revenue, coupled with the failure of most of the states, with a few notable exceptions, to follow New York's lead in the interest of interstate comity, are to be credited with this unfortunate reversal of policy.

Mr. Girdwood of **Maryland** describes some events of interest there. It appears that the voters of the city were to be called upon to vote at the November election, upon three tax propositions, each amending the city charter. One concerned the tax rate in an annexed district, the other two were combined in one vote, the first providing complete exemption for merchandise, the other providing for a reduction of the tax rate on buildings from the regular city rate, of 10 per cent annually, reaching 50 per cent in 1926, which was to be the permanent rate thereafter. As a result of a test case, the court of appeals in a unanimous opinion, has just held both amendments unauthorized by the constitution as conflicting with the home rule provisions granted to the city, and they were therefore not placed on the ballots.

The combination of these two propositions in one vote led Mr. Girdwood to observe that it looked like the work of single tax advocates. From newspaper accounts it appears that they were proposed by the Maryland Tax Reform Association; that this organization has been conducting a vigorous campaign for their adoption, placarding the city and using liberally the advertising columns of the newspapers, and that as neither political party had taken

any interest in the measures, "the fight would have narrowed down to a battle between the single-taxers and the antis."

One of the successful litigants is quoted as saying that the decision meant "that the right to make and unmake tax laws for the city and state, for the time being at least, lies in the legislature where it belongs."

The city tax board reported to the mayor that the exemption would by 1922 remove nearly $120,000,000 of taxable base.

Montana certainly "started something" by the enactment of the new classification law, described in the May BULLETIN and which was further explained and elaborated upon by Secretary Edgerton in his admirable address at the Chicago conference. It is one thing to write a statute providing for such fundamental changes in law and thus upsetting long-established customs and habits; it is quite another thing to "see the thing through." We have heard something of this from Mr. Edgerton who writes a tale of hard work which would well bear elaboration. He writes in part as follows:

"This is the last of September. It seems incredible to me that it has been three and one-half months since we were at Chicago. Nor does it seem seven months since our legislature passed the classified property tax law and vitalized the state board of equalization. Time never before passed so quickly for me. I certainly picked a busy job for myself this last summer.

"Our new laws were approved on February 28th last. The assessment of property obtained as of noon on March 3d following. Three days only remained to change our system. However, we got along finely although county assessors did not willingly relinquish the old and free-and-easy order for the exactions of the new.

"Montana could not have made the change it did at a more critical and unfortunate time. The years of 1917 and 1918 had been lean years. This year Montana has had no rain. Crops generally have been total failures; enormous quantities of live stock have been sold because there was no water and no feed for it, and many homesteaders have abandoned their land and gone elsewhere.

"However, the new laws have come through. They still live. And so do I, *mirabile dictu*. I have had to be peacemaker, general utility man and rough-neck at one and the same time, but the worst is over.

"The comic opera stuff is over. It has resulted in every man-voter and every woman-voter in Montana becoming interested in and anxious for a real honest-to-God tax commission. The constitutional amendment that is now before the people will carry without opposition in November, 1920. Such a commission is absolutely necessary to any real tax reform and improvement in Montana. The people are rousing themselves to the need of progressive changes in the constitution and in the laws. Thus the irritations of 1919 have had their compensations."

At the 1919 session of the **Delaware** legislature the following changes were made in the tax laws:

The income tax law (L. 1917, Ch. 6) was amended by limiting the exemption to state officers to the term of office to which they were elected prior to April 2, 1917, the date of passage of the original law.

Personal exemption was provided following the provisions of the federal law in this respect.

Deductions were changed by permitting the including of expenses of agricultural operations, which were excluded in the original law and of losses resulting from agricultural operations and prohibiting the deduction of federal income taxes.

Two special collectors of state revenue are authorized instead of one and the salary is increased from $1200 to $1400; these collectors are given more extensive power and authority over the methods of collection. Further penalties are provided for failure to pay the tax.

A merchants' license tax was enacted on dealers in grain, fruits and vegetables by wholesale, the tax to be at the rate of 20c. per $1000 of purchases.

The motor vehicle tax was changed so as to provide for a tax of $2 for every 500 lbs. of gross load weight, including the weight of the vehicle and of the maximum load carried.

Secretary Lack of the **California** board of equalization sends note of the changes made at the 1919 session of the legislature.

These changes are mainly of an administrative character and not of general interest, and include extension of the exemption to soldiers in the recent war; various provisions with respect to delinquent taxes and redemptions; fixing the date for payment of taxes; and provision for more efficient record of tax sales.

Provision is made for payment of taxes in any kind of legal tender and also for the appointment by the county board of supervisors of an advisory board to assist the county assessor in the determination of the values of property by acting as a board of appraisers.

Clearly the most interesting item of news we have to note this month is that at the last session of the **Nebraska** legislature, in connection with a reorganization of administrative functions, a Department of Finance was created under the charge of a Secretary of Finance. The duties of this department embrace general supervision over the administration of the tax laws of the state, including a considerably larger degree of control over local taxing officials and the power to order a reassessment of classes of property. Thus Nebraska finally enters the long list of states having effective centralized tax administrative machinery. The usual difficulty appears to have arisen of providing some function for the state board of equalization, hence the proceedings of the department of finance with reference to taxation are made subject to review by this board.

The department is also in charge of the accounting and control of public expenditures and of the preparation, for submission to the Governor, of a budget for all of the state revenues and expenditures.

The bank tax law was amended by prohibiting the deduction from the value of the capital stock of mortgage securities owned by the bank, following the decision in the *Nemaha County* bank case, noted in the BULLETIN for June, p. 241.

An act was passed to provide against one of the disastrous effects of the federal farm loan act. In Nebraska mortgages are taxed as an interest in the real estate and by reason of the exemption of federal land bank mortgages, last year these mortgages were held to be deductible from the full value of the real estate, thereby causing a very material loss in the assessment base. The new act exempts federal farm mortgages from the provision above noted, making mortgages taxable as an interest in the real estate.

We are indebted to the new Secretary of Finance, Mr. Philip F. Bross, for the above notes.

We have heretofore failed to note that at the last session of the **Michigan** legislature a state budget system was established and a budget commission created. This evidently followed as a result of the exhaustive and careful investigation of this subject by Mr. George Lord, a member of this Association.

The inheritance tax law of the state was amended in some particulars.

THE TAXATION OF NON-RESIDENTS IN THE NEW YORK INCOME TAX

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The question of the taxation of non-residents has become especially urgent with the advent of the Income Tax. The problem was, indeed, obvious in principle from the very beginning of interstate taxation. But it so happened that as the economic relations between the states in this country assumed some importance, the administration of the general property tax left much to be desired, so that in practice the tax was not enforced in such a way as to create any considerable difficulties. When the inheritance tax was introduced, the enforcement was more rigorous, and we began to hear more of the difficulties of interstate complications. But even these have been of comparatively little importance. With the advent, however, of the income tax, we are confronted by the problem of double taxation in all its intensity. For under

modern conditions, local and state lines apply only to a very slight extent in the earning of incomes.

There is an additional reason, however, why the situation is still more complicated in New York. In many of the less advanced states of the union, the great majority of incomes within the state are earned by residents of the state; that is to say, there are comparatively few non-residents who sojourn for a protracted period within the state. And, on the other hand, most of the residents of the state secure all or a very large part of their revenue from property situated or business conducted without the state. In New York, however, the situation is very different. In the first place, New York City, as the great metropolitan center, attracts people from all over the country. Not only do they swarm to New York for weeks or months at a time, but a large number of wealthy individuals, who still retain their legal residence in other states, erect princely mansions in New York and live there most of the year. On the other hand, New York City is the financial center of the country: we know that more than one-third of the individual income tax of the entire country is paid in New York. That means that the wealthy residents of New York own a large part of the property of the nation and that the incomes received in New York are to a considerable extent received from sources outside of the state. Finally, New York as the industrial center of the country is crowded with hundreds of thousands of members of the professional classes and of wage-earners who get their living in the city but who commute to the suburbs. Northern New Jersey and, to a less extent, southwestern Connecticut, are nothing but suburbs of New York.

Thus from both points of view the question of double taxation, i. e., the taxation of non-residents on income received within the state and of residents on incomes received without the state, assumes in New York a significance which in practice far transcends that in any other part of the country.

Although, as stated above, the question of double taxation has never been of great importance in the administration of the general property tax, the courts have gradually elaborated some general principles to govern the situation. In the case of real estate, it was comparatively easy to reach the conclusion that real estate ought to be taxed where it was located, irrespective of the residence of the owner. In the case of personal property the situation was more complicated. So far as intangible property is concerned, the rule of law that gradually came to be accepted was *mobilia personam sequuntur,* or "movables follow the person"; i. e., the controlling element is the legal residence of the owner. This decision was obviously due to the fact that we can scarcely speak of the situs of intangible property. When, however, the attempt was made to deal with tangible personalty, a real difficulty arose. Since tangible personalty has a definite location, the question arises why, despite the rule that movables follow the owner, the rule governing real estate should not also be applicable here. The consequence has been an indecision on the part of the courts and our legislators. In some states the rule of *situs* governs, in others the rule of *mobilia personam sequuntur* applies. The result would of course be intolerable if the tax were actually enforced; for in some cases the tangible personalty would then be taxed in neither the state of location nor the state of residence, while in other cases it might happen that it would be taxed in both states. Since the decision of the Supreme Court in the refrigerator case a part of the difficulty has been removed in that no state can henceforth impose a tax on tangible property permanently located outside the state.

When we come to consider the theory underlying the American practice, we find that it was an outcome of the general economic and political doctrines of the day. The ordinarily accepted theory of the relation of the individual to the government, which had come down from the eighteenth century political philosophy, was that the chief object of the state was to protect the individual, and that he ought to pay for this protection by supporting the government. Accordingly, a man ought to be taxed where he permanently resides, for the reason that the government protects him in the state of his residence; and, on the other hand, the tangible property ought to pay where it is located, because it receives the protection of the government there.

In reality, although it was not recog-

nized, two different theories were implicit in this treatment of the matter. On the one hand was the theory that the government affords protection—the so-called protection theory. On the other hand was the theory that the individual receives a benefit from this protection—the so-called benefit theory. These theories are by no means necessarily identical. The protection theory states that the government ought to be reimbursed for the protection it affords, i. e., that the government ought to be paid for the expenses involved in affording protection. This is the cost-of-service theory; that taxation ought to be in accordance with the cost of the service. On the other hand, the benefit theory holds that the individual ought to pay in accordance with the advantage or benefit that he receives. This is the value-of-service theory — that taxation should be in proportion to the value of the service. In the one case we regard the giver; in the other the recipient. Now it is to be noted that there is no necessary correlation between cost of service and value of service. The same service of the government to two different men may be valued very differently by them. The rich man may need for the protection of his person no more police than the poor man; the cost of service may be the same and yet there may be a great disparity in the value of the service. According to the strict protection theory, the rich man would pay no more; according to the benefit theory, he would pay much more. Even if we take the property, rather than the person of the individual, the protection theory and the benefit theory are not necessarily co-terminous. It may, indeed, cost the government more to protect the large property than the small property; but the wealthy owner of the large property may decide not to depend upon the government and may choose to employ private watchmen, detectives and the like, so that he would not get as much benefit from the government protection as the owner of the small property who relies entirely on the police. In that case, while the cost of protection would be greater, the benefit received would not be greater. It is obvious, therefore, that the protection theory and the benefit theory are by no means identical.

The American courts, however, like the economists and publicists from whom they adopted the theory, made no such fine distinction. The only difference is that while the writers generally speak of the benefit theory of taxation, the courts have usually called it the protection theory.

As a matter of fact, however, this theory, although so deeply ingrained in the legal thinking, is erroneous, and has been abandoned by economic and fiscal scientists. It has been retained in the courts to a certain extent and in popular and untutored thought by the mere force of tradition. The theory of protection really is untenable. It is as inapplicable to the person of the taxpayer as to his property; it is unsatisfactory from the point of view both of the cost of protection to the government and of the benefit to the taxpayer.

The theory arose at a time when the chief expenditures of the government were devoted to military purposes and other forms of protection. In modern times, however, the state has assumed all kinds of new functions, among which that of protection counts for relatively little. In the city of New York, for instance, the only protection that the person of the taxpayer gets is from the police and perhaps in a wider sense from the courts; and even in the case of property there is to be added to these only the cost of the fire department. But all these combined do not by any means form the major part of the cost of government. Education, street cleaning, charities and corrections, recreational expenditures and the like, bulk continually larger in modern budgets. Government, nowadays, does far more than merely protect the individual; to measure the obligation resting upon the taxpayer by the cost of protection gives an entirely inadequate picture of the situation.

On the other hand, even if we abandon the cost of protection theory, and take refuge in the benefit theory, the situation is equally unsatisfactory. For, in the first place, the benefits accruing to the individual from governmental action are to a very large extent not susceptible of measurement. Who can measure the benefit received by a particular individual from the expenditures on the courts or the navy? How can we measure the benefits accruing to the property of an individual, as a merchant's stock in trade, from the millions spent by the city of New York on elementary schools? But even to the extent that we can measure the resultant benefits, the

theory labors under the obvous weakness that in many cases the poor benefit more than the rich. The poor man sends his children to the public schools; the rich man to a private school; the rich man has his own night watchman and Pinkerton detectives; the poor man depends on the police; the rich man has his own garden or country house; the poor man enjoys the public parks; the rich man goes to his private hospital; the poor man in a large measure to the municipal hospitals; the rich man contributes to the charities; the poor man is a beneficiary of charities. Modern government ministers in increasing measure to the needs of the mass. If it were possible to measure benefits in dollars and cents, the benefit received from a not inconspicuous part of modern government outlays would be in inverse proportion to wealth. So that, if benefits were to be the test of taxation, the poor would frequently be called upon to pay more than the rich.

Without going into all these subtleties, however, the basic reason why the protection or benefit theory is not applicable is that it gives an erroneous explanation of the relation of the individual to the government. The modern democratic theory of taxation, which rests upon the more organic theory of the state, is that of faculty or ability to pay. As we have sought to express it elsewhere,[1] the modern theory of political science recognizes the fact that the public collective wants are as much a part of the nature of civilized man as are his individual private wants; and that the essence of taxation is a moral, as well as a legal, obligation. The government, indeed, must do something for the community in return for the support which it receives. But this reciprocal obligation on the part of the government is not toward the individual as such, but toward the individual as a member of the group. The special benefit is swallowed up in the common benefit. The special benefit to the individual is, in most cases, not even measurable; for the distinguishing characteristic of modern civilization is the spread throughout the community of these impalpable, non-material results of good government which make for the common welfare, and particularly for the higher life. In its ideal form, at all events, the state must be likened not to a joint-stock company, but to a family. The citizens are not stockholders but brethren, animated, if they are patriots, by the same ideals and by the same fine sense of coöperation in the common interest. Whatever the test of this moral obligation to contribute to the support of the whole may be, it is, in the state as little as in the family, assuredly not the measure of benefit received. Not only is the test impracticable, but if it were practicable it would be inadequate.

It must, of course, not be understood that this exhausts the explanation of the relations of the individual to the government. The government often does things for the individual where the principle of equivalents rather than the principle of ability comes into play, i. e., where the government does a particular thing for the individual and the individual receives a special benefit in return. The government in such a case functions, as it were, in a business capacity; it acts to a great extent as a private business man would act. It gives something to the individual which is of special value to him and it demands a payment in return for the particular service. But such payments, as has been fully explained elsewhere,[2] are called prices or fees or special assessments, and are not to be confused with taxes. Taxes must be levied in accordance with the principle of ability to pay: other charges of government may be assessed on the principle of benefits.

The contrast between the principle of ability and the principle of benefits is, however, less sharp than is often supposed. This is largely due to the fact that the interpretation commonly put upon the ability theory is the one formulated by John Stuart Mill who maintained that the ability of the individual to pay taxes is to be measured by the sacrifice imposed upon him in paying the taxes. In other words, the ability theory was identified with the sacrifice theory.

There has, however, been a great deal of confusion about this concept of sacrifice. In a wider sense, the sacrifice theory may indeed be defended, although the term employed would even then be inexpedient. In the narrower sense, however—that is, in the

[1] *Essays in Taxation*, 8th ed., 1913, pp. 337 *et seq.*

[2] *Op. cit.*, pp. 436-446.

sense in which it was employed by John Stuart Mill and in which it is commonly understood at present—the sacrifice theory, or the sacrifice concept of ability to pay, is incorrect, because inadequate. Let us make this clear.

As it has been pointed out,[3] there are two sides to every man's economic activity —the production or acquisition of wealth and the consumption or disposition of wealth. The acquiring of the wealth normally costs some effort; the parting with the wealth also involves a pain. Now if by sacrifice we mean the costs involved, i. e., the costs of acquisition as well as disposition, then indeed the sacrifice theory is correct in the sense that from the point of view of economic psychology the test of ability to pay taxes is an amalgam of both of these costs or sacrifices.

But the term sacrifice, as conceived by John Stuart Mill and as commonly understood, refers only to the pains involved in parting with wealth. Sacrifice, thus interpreted, means a sacrifice of disposition, a sacrifice of consumption. The common defence of progressive taxation, for instance, is that the relative sacrifice of parting with the tax diminishes with the amount of one's wealth. When we speak of sacrifice, we think in such a case only of the interference with the enjoyment or consumption of wealth.

This, manifestly, is a one-sided or inadequate view. For, just as there are differences involved in the disposition of wealth, so there are differences involved in the acquisition of wealth. These differences in the ease of acquisition may be termed acquisition costs or production costs as over against the disposition costs or consumption costs. If the term "sacrifice" is employed to designate the latter cost, the term "opportunity" might be used to designate the former. There are all manner of differences in opportunity which explain the relative ease of acquiring wealth. The most important of these differences, apart from those inherent in the very nature of things, depend, so far as the government or the social sanction is concerned, largely on the question of privilege. Society and state afford the individual all manner of privileges, most of them entirely legitimate, which help him to add to his wealth. It is, therefore, defensible to contrast privilege with sacrfice. The economic privileges conferred upon the individual in the acquisition of his wealth affect his ability to support the government no less than do the relative sacrifices imposed upon him in parting with his wealth. In other words, instead of there being one aspect or test of taxable ability, there are two: the privilege side as well as the sacrifice side, the acquisition side as well as the disposition side. A man's ability to pay taxes is to be measured not only by the relative burden imposed upon him in parting with his wealth, but also by the relative ease with which he has acquired his wealth.

Now, inasmuch as, and to the extent that, the privileges enjoyed by individuals result in actual benefits to them, the privilege theory may be in part at least interpreted in terms of the benefit theory. It is clear, then, however, that the real objection to the old protection or benefit theory is not so much that it is false as that it is exaggerated. It represents only a part of the truth, and only a small part. But the same thing may be said of the sacrifice theory. It also represents only a part, even though a larger part, of the truth.

In its proper formulation, then, the benefit theory is not opposed to the faculty theory, but really forms a part, although a minor part, of the ability theory. It is only to the extent that the benefits or privileges conferred upon the individual augment his ability to pay that they deserve any consideration at all. To erect the benefit theory into an all-embracing theory is incorrect; to say that benefits or privileges are one of the elements modifying the ability of the individual is justifiable. The benefit or protection theory is not an independent theory, standing side by side with the faculty or ability theory: it can be upheld only as one of the two constituent elements that compose the ability theory. It is because the ability theory has been incorrectly identified with the sacrifice theory that this confusion has resulted. Ability or faculty to pay is the fundamental explanation of all taxes; but ability to pay is composed of two elements, the privilege element and the sacrifice element. Benefits may be contrasted with sacrifices; the benefit theory cannot correctly be contrasted wth the ablity theory.

[3] *Op. cit.*, pp. 339-340.

This confusion of thought has led many writers astray. Some of the leading continental writers on finance hold, for instance, that the line can be drawn between the general state taxes, to be imposed upon the principle of ability, and local taxes which are imposed on the principle of benefit.[4] This is clearly illogical, for it is obvious that the extent of benefits received has no connection in principle with the question as to whether we are dealing with local or state government. A piece of land, for instance, which is often chosen as an example, may indeed have its value enhanced by local causes; but it is equally possible that the value of the land may be enhanced by general state or national legislation, as, for instance, by a protective tariff on agricultural products. Similarly, some American writers [5] commit an error in trying to distinguish between certain taxes that are levied on the principle of protection and others that are assessed on the principle of ability. There is no such distinction. Taxes differ from other forms of public revenue in that they are all levied on the principle of ability, even though it may be entirely legitimate for some taxes to emphasize the element of privilege and for others to emphasize the element of sacrifice.

The American legal theory, however, so far as it has been applied to the general property tax, although incorrect, works out in practice much better than might have been supposed. This is a characteristic of Anglo-Saxon politics and jurisprudence, which have always been stronger in practice than in theory. For if the ability of an individual to pay taxes is measured by his property, there is no doubt that the obligation to pay taxes is due in part at least to the jurisdiction where the property is situated. The theory, however, as we know, not only breaks down in the case of intangible property, but also pays no attention to the other element in the conception of ability, *viz.*, the element of sacrifice. Above all, the American legal theory becomes defective when we desire to apply it to the income tax rather than to the property tax. It is necessary, therefore, to seek another approach to the problem.

[4] Wagner, *Finanzwissenschaft*, part 2, 2d ed., 1890, pp. 138 *et seq.* Wagner is followed by many German writers.

[5] See the draft report of the committee of the National Tax Association on a model system of state and local taxes, 1919, pp. 19-30.

II.

As a preliminary to working out the principles of double taxation or the taxation of non-residents, it is necessary to recall the familiar distinction between personal and impersonal taxes. A personal tax is a tax levied on the person as such; an impersonal tax is a tax levied on the thing rather than on the person. When the land tax is assessed, as in the state of New York, upon the plot of ground rather than upon the person who owns the land, it becomes an impersonal tax, or what the lawyers call a tax *in rem*. In other words, although of course someone must pay the tax, the law pays no attention to the personal situation of the owner; the tax is imposed upon the land, irrespective of how much the owner may have borrowed upon it. So in the same way, the tax may be levied upon capital or personal property, irrespective of who owns it; or the tax may be levied upon a business irrespective of who carries it on. As opposed to these impersonal taxes, we have the personal taxes; and as the wealth of the individual may be measured in terms either of property or of income, the personal taxes are either property taxes or income taxes. What we have to deal with here are specifically income taxes.

The income tax, however, may either be a general income tax, as in the United States, or it may consist of a series of special income taxes, i. e., taxes on the income from special sources. The new French income tax, e. g., consists of both kinds; it is composed of a series of special taxes on the various categories of income supplemented by a tax on the entire income. Even the British income tax may be considered as a combination of the two methods. For in so far as some of the schedules involve taxes on the separate sources of income with collection at source, they are really special income taxes; whereas the super tax is a tax on the income as a whole.

These special income taxes may be of several kinds. In the first place, there may be a tax on the income either from the ownership of land or, where there is a distinction between ownership and cultiva-

tion, from the cultivation of land. In the next place, there may be a tax on the income from capital or what in this country is called personal property. This may take the form of a tax on the income either from tangible personalty or from intangible personalty, like securities. In the next place, we may have a tax on the income from professions or occupations, including taxes on wages as well as salaries. Finally, there may be a tax on the income from business.

These special income taxes are really akin to the impersonal taxes. It is true indeed that, as in all other income taxes, an allowance may be made for the personal situation of the taxpayer, so far as concerns the question of indebtedness or of exemptions or abatements. But to the extent that they are assessed on the source of the income, or on the income with respect to the source, they partake to a certain extent of the nature of impersonal taxes levied on the source. Consequently when it is possible to divide a general income tax into its constituent elements and to levy special income taxes, these are more properly to be considered as impersonal, rather than personal, taxes.

The study of the problem of the taxation of non-residents must always bear in mind this distinction between general income and special income taxes, and between personal and impersonal taxes. If we are dealing with a general income tax, then if the individual earns his income in one jurisdiction and spends it in another the tax ought, from the standpoint of abstract justice, to be equally divided between the two jurisdictions. This solution proceeds on the assumption that the element of privilege is just as important as the element of sacrifice in the conception of ability. If, however, this is not accepted and if a greater importance is attached, as may well be the case, to sacrifice than to privilege, a proportionately larger share of the tax ought to go to the jurisdiction where the individual lives and spends his income than to the jurisdiction where he earns his income. In practice, however, neither the one nor the other solution is of great consequence; for the attempt to apportion the tax-paying ability of individuals in such a way would, in the absence of any effective national regulation, involve almost insuperable difficulties. Under actual conditions there are only three possible solutions of the problem.

In the first place, the income tax might be regarded as a combination of special income taxes and everybody, resident and non-resident alike, might be taxed only upon that part of his income received from sources within the state. The theory here would be that as each state would levy nothing but special income taxes, or taxes from the income of special sources, each individual would in the end pay a general income tax as a summation of the taxes imposed on the source of income within each state. Taxes on all the sources of income amount finally to a general tax on all income.

The obvious objection to this course, especially so far as residents are concerned, is that the other state or foreign country where part of the income is received may not impose an income tax, so that the individual would not be paying a fair share as compared with his neighbor whose income is received entirely within the state. There would in practice be no such combination of special income taxes as to constitute a general income tax. In addition to this general objection, however, there is another formidable difficulty. For even if the above objection were removed, so that the tax might be considered a general income tax, then this solution, however acceptable in a debtor state like Wisconsin, would be open to the objection adverted to above, that in a financial center like New York the proportion of income received from its inhabitants from sources outside New York forms the overwhelming percentage of the whole. A creditor state like New York would accordingly find such a solution fiscally inadmissible. The revenue which it would receive from the taxpayers would be insignificant when compared with the expenditures which it would be called upon to incur because of their presence within its borders. The solution, in short, would be theoretically unsound because of the over-emphasis put upon the opportunity or privilege side of faculty as compared with the sacrifice side. We must, in a general income tax, bear in mind not alone income earned but income spent—not only the production side, but the consumption side of ability to pay. The Wisconsin principle is as defective in principle as it would in New York be hopeless

in practice. If the time should ever come when capital, industry, and population should be equally distributed throughout the union and when every state should impose an income tax of its own, then, and only then, would the above solution be relatively satisfactory as among the separate states, although still open to criticism in its international aspects. But in default of these two vital conditions, the principle is unacceptable at present in a state like New York, so far as the individual income tax is concerned. The matter is, of course, quite different with a corporate income tax, where this principle is not only legitimate but actually applied in New York, under the Emerson law. For, as we shall see below, not only is the conception of faculty or ability to pay to be interpreted differently in the case of corporations as compared with individuals, but corporations are taxed in virtually all states, upon either their income or the sources of the income.

In the second place, residents might be taxed on their entire income and non-resident might go scot-free. This would proceed on the theory that each state levies a general income tax, so that no individual will escape his due share. The difficulty with this solution is equally great. For, in the first place, there is no assurance that the other state will impose an analogous income tax, in which case residents will be subject to a disadvantage. Why, for instance, if New Jersey imposes no general income tax, should its residents who carry on their business in New York in competition with New Yorkers be exempt from taxation in New York on that business or on the income derived from the business. Why should the New Yorker who is pursuing his occupation side by side with the Jerseyite be put at this manifest disadvantage? In the second place, this solution of the problem would involve the important practical consequence that any New Yorker who desired to escape his taxes could easily do so by transferring his legal residence to his summer home in New Jersey. It is well known that the chief reason why the general property tax has broken down so completely in New York city is the facility afforded to wealthy New Yorkers to claim their legal residence in the environs. The one great advantage of the income tax over the property tax is that it tends to decrease this movement. Such a result, however, would be entirely defeated if non-residents were exempted on their income earned within the state of New York. No solution of the problem which fails to put a stop to this deplorable practice of local expatriation can be acceptable. The exemption of non-residents from income taxation would fail to cure the existing inequality of the general property tax and would create a new and still more indefensible inequality.

We are led, therefore, to the remaining solution as the only possible one, namely, to subject residents to a general income tax on their entire income, from whatever source derived and to subject non-residents to the special income taxes; that is, to arrange that non-residents should be liable only on such income from special sources as is received or earned within the state.

This solution, satisfactory as far as it goes, is open to the criticism that if two states impose a similar tax and follow the same principle they may create cases of unjust double taxation by superimposing in practice special income taxes upon a general income tax. For if individual A earns his money and spends it in one state, he would be taxed only once on his entire income; while B, with the same income, who earns his money in one state and has his legal residence in another, will be taxed twice, once by the state where the income is earned and again by his state of residence.

A simple escape from this difficulty can, however, be found in a provision whereby the state where the income is earned permits the non-resident to make a proportionate deduction of such tax on the income earned within the state from the tax, if any, which may be levied by the state of residence. This was the solution suggested by the present writer and adopted in the New York law.[6] The working-out

[6] Section 363: "Whenever a taxpayer other than a resident of the state has become liable to income tax of the state or country where he resides, upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the controller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; providing that such

of the system in practice would then be as follows. If, in the first place, New Jersey, for instance, imposed no income tax, the Jerseyite would be subject to taxation in New York on his income earned within the state. To this special income tax there can surely be no objection. For if the tax be regarded as a general income tax New York is assuredly justified in seeking to reach the privilege side of the Jerseyite's taxable ability; if New Jersey elects not to attempt to reach the sacrifice side of his taxable ability, that is its own concern. But if the tax be regarded, as is more properly the case, as a special income tax on the non-resident, the defence of the solution is even stronger. Not only is the method defensible, but for New York to refrain from action would involve an inequality. If two contiguous pieces of land are owned respectively by a New Yorker or a Jerseyite, if two competing business houses are occupied respectively by a New Yorker or a Jerseyite, if two dentists, one a New Yorker and the other a Jerseyite, carry on their professions on opposite sides of the same New York street, is there any reason why, in the absence of any income tax by the state of New Jersey, the Jerseyite should be preferred to the New Yorker? Why should the sources of income within the state be taxable to some and not to others? Far from imposing any additional burden upon the Jerseyite or interfering in any way with interstate commerce the taxation of the Jerseyite would bring about substantial equality in treatment with that of the New Yorker. To do less than this would give him an unjustifiable preference.

As a matter of fact, however, such a preference is actually given to him in one respect in the New York law. While the resident is taxed on his entire income including that from intangible personalty, the non-resident is exempt from income tax on his intangibles, unless these are employed in his business. This preference to the non-resident is explicable on the ground that otherwise the market for New York securities and the preëminence of New York as a financial center might be jeopardized. Favor to a non-resident is preferable to the decay of New York. Equality of taxation may be made to bow to general economic expediency, just as Great Britain in her recent *post-bellum* loan exempts foreigners from income tax on the bonds. The point remains, however, that in this respect non-residents are actually favored. But because they are favored in one point, there is no reason why they should be favored in other points, where there is no compelling economic consideration. Great Britain exempts foreign bondholders, but does not exempt landholders or foreign business men or foreign capitalists from income tax. Why should New York do so?

On the other hand, New York does something which Great Britain and other countries do not attempt to do. New York is careful to prevent unjust duplicate taxation. If New Jersey should levy an income tax, New York allows the Jerseyite to deduct from the New York tax a proportionate part of the tax levied by New Jersey—subject, indeed, to the condition of reciprocity, i. e., that New Jersey will agree to treat New Yorkers in the same way. The consequence of this would be that if New Jersey imposed an income tax at the same rate as that of New York, the Jerseyite would in final result pay little or nothing in New York. Inasmuch, however, as he would pay an equivalent tax in New Jersey, this would operate to accomplish two important results. In the first place, it would preclude any financial advantage to the Jerseyite, and, far more important, secondly, it would prevent the great evil alluded to above, i. e., the inducement on the part of wealthy New Yorkers to claim a legal residence in New Jersey. The law, therefore, will operate not only to prevent the fictitious emigration of New Yorkers but also to subject bona-fide Jerseyites to the same burdens as those borne by their New York competitors. It does not impose any additional burden on them and it does not create any discrimination against citizens of another state.

This solution of the problem, therefore, constitutes a forward step in the treatment of non-residents. In subjecting non-residents to taxation on the income derived from sources within the state, the law does not differ from either the federal law or any other important income tax

credit shall be allowed only if the laws of said state or country grant such similar credit to residents of this state subject to income tax under such laws."

law. In every country foreigners are taxed upon their income from sources within the country, with the minor exception of foreign-held bonds in certain cases. The chief difference between the New York law and that of most countries is that in the latter cases no such equitable provision is made for a proportionate and reciprocal deduction of the tax where the home country imposes a tax on the same income. The New York law hence marks a distinct advance in the treatment of this problem. Resident and non-residents alike are subjected to taxes on income earned within the state; residents are subjected in addition to a tax on income from all other sources; and non-residents are freed from double taxation by a reciprocal deduction which operates similarly to free residents of New York from double taxation by a sister state. The net result is equality all around.

There is only one point in which residents and non-residents are not treated alike in the New York law. In the case of resident taxpayers the law allows an exemption of from one to two thousand dollars together with two hundred dollars for each dependent person. It would seem that the absence of any such exemption in the case of non-residents constituted a real discrimination. As a matter of fact, however, here is no reason for such a criticism.

The theory underlying the law is, as we have seen, that the state of residence may also impose an income tax. If New Jersey or Connecticut were to impose an income tax it could avoid possible injustice to its residents on the part of New York by permitting an exemption similar to that granted by New York to its residents; through the reciprocal provisions of the law just mentioned all the difficulties would then at once be adjusted. If New Jersey preferred not to grant such an exemption, the discrimination would be chargeable not to New York but to New Jersey. The only possible case of inequality chargeable to New York might arise where New Jersey, for instance, does not impose any income tax at all, and where the income of the Jerseyite is wholly or almost wholly earned within New York. Such a situation, not contemplated by the framers of the law—who looked forward to the speedy adoption of income tax laws by the neighboring states—can, however, be easily remedied. The non-resident might be permitted to file a declaration of his entire income within and without the state of New York and might be granted such proportion of the statutory exemption as corresponds to his income within the state. A still simpler solution of the problem would be to grant to non-residents whose income from wages, salaries, or professional earnings of New York were under a modest figure, say five or ten thousand dollars, the same exemption as that accorded to residents. But this provision should be enforced only as long as New Jersey does not levy an additional income tax of its own.

It appears, therefore, that in the main the New York law meets all the legitimate demands of interstate comity. It does not subject non-residents to any additional burden; and it paves the way for the adoption of a system whereby all individuals would be treated on an equality according to a fairly correct interpretation of the principle of taxable ability to pay taxes. To do anything more than the law now states, with the possible exception of the minor and temporary amendment suggested in the last paragraph, would be to accord an unfair advantage to non-residents and to create an artificial inducement to an illicit emigration of residents.

It is also not to be overlooked that in the treatment of individuals the New York law is more favorable to non-residents than is the case in the existing corporate income tax or the so-called Emerson law applicable to corporations. It is a principle long since adopted by the American states and upheld by the American courts that non-resident or foreign corporations should be subject to taxation as well as domestic corporations. In the case of New York, indeed, as is true of the most advanced states, resident corporations are taxed not upon their entire income but only upon so much of the income as is earned within the state. This distinction between natural and artificial persons or between individuals and corporations is, as mentioned above, entirely justifiable, owing to the fact that in the case of corporations the element of sacrifice in the concept of ability is of less importance than that of privilege. When compared with individuals the corporation as such does not consume its earnings: it distributes them to the stockholders who are the final consumers. It is reasonable, therefore, that corporations should be taxed only upon that part of

their income earned within the state. The significant point, however, to be emphasized here is that while foreign corporations are also taxable upon their income earned within the state, there is no reciprocal provision in the case of corporations as in that of individuals which permits the corporations to deduct any part of the tax payable in New York. In the case of foreign corporations there is no possibility that the state of New York would fail to receive any revenue at all; whereas in the case of non-resident individuals, as we have seen, there is every likelihood that the state of New York would receive no tax, whenever the state of residence imposed a similar tax. Individuals therefore are treated by the new income tax law more favorably than are corporations. Since the method of dealing with corporations has been upheld by the courts there is no reason to suppose that the more favorable treatment accorded to individuals will be disallowed.

There are still to be mentioned two minor points in the treatment of non-residents in the New York law. One is an inadvertence in the law whereby in the final draft, which changed the originally contemplated flat rate of 2% in a graduated 1-2-3% rate, an oversight was committed in failing to make the same change in the section affecting non-residents. This, however, is a mere slip, which can easily be corrected before the law goes into operation.

The only other difference in treatment between residents and non-residents is that in the case of non-residents the employers are obligated to withhold the tax from the salaries of their employees. If the principle of the law itself is sound, however,—namely, that of the equal treatment of residents and non-residents—there can be no valid objection to this administrative provision. For from the administrative point of view it would be practically impossible, or certainly most difficult, otherwise to ensure the payment of the tax from non-residents who are engaged in salaried occupations in New York. The intent of the law is to reach all those who are taxable under its provisions. In the case of residents the taxpayers can be reached through the ordinary processes of law; in the case of non-residents, a personal tax cannot be assessed with any assurance of equal enforcement in any other way than in the manner indicated. The difference in administrative treatment between residents and non-residents is thus simply a method designed to secure a real equality of taxation. It imposes no discriminatory burden upon non-residents, but on the contrary endeavors to prevent a discrimination against the resident, who would otherwise be subjected to a more severe burden. The intent of the law here again is equal treatment: the ostensible inequality resolves itself into a higher equality.

It is clear from the above review that the taxation of non-residents is only a part of the great problem of double taxation. No final solution of this problem is possible in a federal union like the United States without a uniform rule which can either be imposed from above or adopted from below. This uniform rule can be imposed either by the national legislature, as is the case in Switzerland, Germany, and some other federal unions or, what is far more probable in the United States, by a series of rulings of the Supreme Court binding upon the separate states as in the case of the federal judicial regulation of the national bank tax. It is clear, however, from what has preceded that we are not yet ready, and probably shall not be for some time, for such a federal regulation in detail. The economic differences between various states and various sections of the country and the great problem of the debtor *v.* the creditor state may make such a solution, which is abstractly equitable, bear with great hardship on certain states and sections. New York, as we have seen, is in a very different position from many of the western and southern states, and a rule which would be acceptable elsewhere might be entirely inadmissible in New York. Until the time comes when there is a much greater equality of economic conditions in the United States, a far more satisfactory solution of the problem will be found in that accepted by the state of New York. Provisional though that solution be, it is nevertheless one in harmony with considerations of economic expediency and the dictates of economic justice. It is certainly to be hoped that the Court will be sufficiently swayed by such considerations as to lend the weight of its approval to what is, on the whole, the most satisfactory adjustment yet reached of a difficult and complicated matter.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

EXEMPTIONS—RAILROAD PROPERTY.—A Minnesota statute imposes a tax of 5 per cent on the gross earnings of railways and the real estate owned and used for railway purposes is exempt from property taxation A railroad on assessment date, had removed its offices to a new office building and the old building was being used partly for storage purposes and a portion was leased to an express company which operated express lines over the railway. It was held that the evidence was insufficient to show an abandonment of the old building for railway purposes; that it was primarily used for such purposes and that the occupancy of a portion of the building by the express company was not sufficient to overturn the finding of the trial court that the property was exempt. — *State* v. *Great Northern Ry. Co.,* 171 N. W. 317.

PROPERTY IN TRANSIT — STORAGE.— Automobiles stored in Minnesota on assessment date, awaiting instructions from the home office of the manufacturer in Detroit, as to shipment, were held to be taxable, under the general principles announced in various cases cited, that property stored for an indefinite time, at least for other than natural causes, or for lack of transportation facilities, may be lawfully assessed by state authorities.—*State* v. *Maxwell Motor Sales Co.*, 171 N. W. 566.

TREATIES — FORCE AND EFFECT—INHERITANCE TAXES. — The treaty between the United States and Great Britain (Act March 2, 1899, Stat. 1939) which provides that citizens or subjects of the contracting powers may dispose of their personal property by testament or otherwise, paying such duties only as the citizens or subjects of the country where the property lies, shall be liable to pay in like cases, renders nugatory, as to citizens and subjects of Great Britain, the provisions of the North Dakota inheritance tax law (L. 1913, ch. 185) which imposes upon non-resident aliens a larger tax than that imposed upon citizens or resident aliens.—*Trott* v. *State,* 171 N. W. 827.

TAX COMMISSION — POWERS. — The North Dakota Tax Commission is given general supervisory powers over the administration of the tax laws of the state and is authorized to require taxpayers to furnish information concerning their properties and to summon witnesses to appear and give testimony. The taxpayer, an electric light company, was a foreign corporation whose property had been assessed by the local assessor as provided by law. The tax commission thereafter sought to investigate the assessment under the authority above described. It therefore summoned local officials of the company to appear and furnish the general books of account and other data deemed material to the investigation.

The court, on appeal, held that the power given was not an arbitrary or unlimited power, but one to be exercised reasonably and within proper limits; that it must appear that the order was made in some manner before, and within the jurisdiction of the commission and that there was some reasonable basis for the action of the commission; that in this case the facts as stated were insufficient to justify the entry of the order; that the tax commission law was not intended to abrogate the system of local assessment whereby local officers are charged with the duty of assessing, reviewing and equalizing the properties subject to their jurisdiction. — *State Tax Commission* v. *Hughes Electric Co.,* 171 N. W. 840.

INCOME TAX — BOOKKEEPING FACTS— INCOME RECEIVED. — In the course of an opinion by the U. S. District Court, in which the ultimate decision was held in abeyance, pending the decision of the appellate court as to the questions of law involved, some pertinent observations were made as to the essentials required to disclose the actual receipt of taxable income.

The facts in question were that a corporation, desiring to increase its capital stock without the use of new money, formed a new corporation with the desired capital. The forms were observed of selling the property of the original corporation to the new one at a valuation equal to the new capital. Upon the books the transaction appeared as a cash transaction, thus nominally disclosing a large profit to the selling corporation and yet, as the judge observes, "In point of fact, at no time was a dollar handled by anyone or in sight. The facts were all manufactured bookkeeping facts." Accordingly the judge expressed the view that the words "income received" meant actually received and did not include "something which exists merely as a figment of the imagination" and that "the common sense conclusion is that the exacted tax is not payable." —*U. S.* v. *Alpha Portland Cement Co.,* 257 Fed. 432 (see also 242 Fed. 978).

Inheritance Tax—Transfer in Contemplation of Death.—In a recent California case, after an elaborate discussion of the facts and circumstances surrounding the transfers in question, the court held that they were not made in contemplation of death or in lieu of a testamentary disposition and hence were not subject to tax, notwithstanding the existence of an antenuptial settlement which was ratified by the will.—*In re Minor's Estate,* 180 Pac. 813.

Internal Revenue—Illegal Assessments — Recovery. — Where railroads, seeking to recover from collectors of internal revenue, taxes illegally assessed, delayed in pressing their claims on account of an understanding with the collectors that the claims should await the decision of other pending cases, but it became apparent that the question of interest could not be adjusted, and would have to be submitted to the court, the railroads' conduct did not disentitle them to interest for lack of diligence in prosecution.—*Boston & P. R. Corporation et al.* v. *Gill,* 257 Fed. 221.

Inheritance Tax — Contemplation of Death. — In a recent case in which there was a transfer of property made by a father to a son, who had without compensation performed services for his father during his lifetime, the supreme court of Illinois follows its own and the commonly accepted definition of the meaning of the words "in contemplation of death" as used in inheritance tax statutes, as meaning not the general expectation of all rational mortals that they will die some time, but an apprehension of death arising from some existing infirmity or impending peril.

It holds that the transfer of the property involved, not having been made to take effect in possession and enjoyment during the lifetime of the grantor, and the presumption of law arising from the relationship of father and son being that the services were rendered gratuitously, and there being no express contract or circumstances from which the law would imply a contract, the transfer is subject to the inheritance tax.—*People* v. *Porter,* 123 N. E. 59.

Exemption by Commutation. — The Texas civil court of appeals has recently held that the provision in a statute (Acts 1903, p. 169) that mutual insurance companies should pay a tax on gross premiums and that "no other tax shall be required of such mutual insurance companies," carries exemption merely from other *occupation* taxes and that the company in question was properly assessed for back taxes on property which had not been assessed.

It is held that while a different rule obtains elsewhere, in Texas the constitutional prohibition against exemptions from taxation other than as authorized by the constitution, prevents the enactment of commutation taxes in lieu of property taxes.—*Miller's Mutual Fire Ins. Co.* v. *City of Austin,* 210 S. W. 825.

Special Assessments — Benefits. — Land which is not and cannot be drained by a sewer, cannot be assessed therefor. Under a charter of Portland (Ore.) a property-owner cannot be assessed for a sewer unless he receives a special benefit therefrom. An assessment held void where the sewer was laid through private land of another and landowner could not use it without being a trespasser. — *Duniway* v. *Cellars-Murton Co.,* 179 Pac. 561.

Exemptions—Indian Lands. — Lands allotted to an enrolled Choctaw freedman under the Atoka agreement, embodied in

Act of Cong. June 28, 1898, which lands were to be non-taxable for a period of twenty-one years, or while the title remained in the original allottee, are exempt from state taxation. The allottee acquired vested rights of exemption, which were not abrogated by Act Cong. May 27, 1908, removing restrictions upon alienation and providing that the lands from which restrictions were removed should be subject to taxation.—*Farris* v. *Union Cent. Life Ins. Co.,* 179 Pac. 919. See also for similar case, *Board of Commissioners* v. *Hutton,* 179 Pac. 922.

RECOVERY OF ILLEGAL TAX COLLECTED. —A taxpayer cannot recover an overpayment of taxes voluntarily made. The procedure for recovery of illegal taxes, under the statutes of Arizona, is outlined in detail.—*Arizona Eastern R. Co.* v. *Graham County,* 179 Pac. 959.

"PROPERTY"—LEASEHOLDS OF STATE-OWNED LAND—"IMPROVEMENTS"—VOID ASSESSMENTS. — Under the definition of "property" in the Civil Code of California (secs. 654, 701, 761) the interest of one under lease of tide lands from the state, is an "estate for years" and is property. The constitutional provision for the taxation of all property is not self-executing but imposes upon the legislature the duty of providing a method of ascertaining the value of the property to be taxed. The statute (sec. 3617 Polit. Code) declares the term "real estate" to include "the possession of, claim to, ownership of, or right to possession of land." A leasehold estate carries a right to possession of the land leased and is therefore real estate. Other sections provide a complete scheme for the assessment of property and the levy and collection of taxes. This scheme is as readily adaptable to an estate for years as to a freehold estate.

The requirement that all property shall be taxed is satisfied as to land in which there is a fee and a leasehold, by the taxation of the entire value of the fee; but if the state owns the fee and the land is leased, the leasehold may be taxed apart from the fee.

A possessory right in public land is "private property," and may be assessed to the person in possession although in point of law he may have no right as against the state, which owns the land.

When a lessee of tide land builds a retaining wall and fills in submerged land, the fill so made is not an "improvement" within the meaning of the provision for the taxation of improvements.

When an assessor includes and blends in an assessment property not legally assessable, the entire assessment is void. The stone breakwater is an "improvement" but as it was not separately assessed but included with the fill, this part of the assessment was void because the court could not indulge in the "presumption that the assessor, in making the assessment, included therein only such property as was legally assessable."—*San Pedro &c. R. Co.* v. *Los Angeles,* 179 Pac. 393.

INCOME TAXES, FEDERAL — DIVIDENDS THROUGH PARTNERSHIP—DEPARTMENTAL CONSTRUCTION. — Under the income tax law of 1913, a member of a partnership need not include as part of his net income, subject to tax, funds derived from or through the partnership, which had been received by the firm, such as dividends on stocks owned by it in corporations taxable on their net income.

Where the internal revenue department has decided a question under the income tax law two ways, neither decision can be given the effect usually given to an established practice of an executive department.

In case of ambiguity in the income tax Act of 1913, the language is to be construed most strongly in favor of the taxpayer.—*United States* v. *Coulby,* 258 Fed. 27. (See BULL. IV, 81.)

INCOME TAX — "LOSS INCURRED IN TRADE." — Loss by a stockholder of the value of corporate stock, acquired by numerous transfers of property to the corporation and taken in payment of corporate debts, the transactions extending over a considerable period, being complicated in character and involving large sums of money, so that they must have required much time and attention, is a loss "incurred in trade," which can be deducted from the gross income under the income tax act of 1913, § 2, par. "b."—*Bryce et al.* v. *Keith,* 257 Fed. 133.

CORPORATION EXCISE TAX—"ENGAGED IN BUSINESS"—RECOVERY.—A railroad company, whose road was operated by another railroad company as lessee, was held not a corporation "engaged in business" within the meaning of corporation tax law of Aug. 5, 1909, § 38, and therefore not subject to the imposition of the tax authorized, and taxes assessed against the lessor railroad were illegal, and, having been paid under protest, may be recovered, with interest, from the collector of internal revenue.—*Old Colony R. Co. et al.* v. *Gill; Same* v. *Malley,* 257 Fed. 220.

POWER TO TAX—RETROACTIVE STATUTE—SPECIAL ASSESSMENTS.—A law of Washington (L. 1911, sec. 40) requiring as a prerequisite to foreclosure of certificates of delinquency, the payment of local improvement assessments, is not invalid when made to operate upon certificates purchased before the act in question took effect. The purchase by an individual of a certificate of delinquency is not a contract with the state which would prevent a subsequent change in the tax laws affecting that certificate. To so hold would be to allow any given act of the legislature at one time to indefinitely limit the future taxing power of the state.

The power to levy special assessments is derived from the sovereign power and is clearly referable to the taxing power.—*Everett* v. *Adamson,* 180 Pac. 144.

FEDERAL ESTATES TAX—DEDUCTION OF STATE INHERITANCE TAXES.—The federal district court held in a recent case that the Pennsylvania collateral inheritance tax, as construed by the courts of that state, is payable out of the estate and not from the estate going to the collateral beneficiary as such. This being so, it is deductible before computation of the federal estates tax, either as an administrative expense or as a claim against the estate, or in any event as being among "such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered." (Sec. 201 of Title 2, Act of Congress of Sept. 8, 1916.)—*Northern Trust Co.* v. *Lederer,* 257 Fed. 812.

BANKS—DEDUCTION OF FEDERAL RESERVE BANK STOCK.—The federal circuit court of appeals recently passed upon the question whether, in valuing the shares of a bank for taxation under the Ohio statute, the shares of stock held by the bank in question, in a federal reserve bank, should be deducted, in view of the provisions for exemption contained in the Federal Reserve Act (38 Stat. 251). The court expresses itself as satisfied not only with the correctness of the conclusion of the district court, that the bank stockholders were not entitled to the deduction claimed but with the reasoning of its opinion, and affirms the judgment upon that opinion (*First Nat. Bk.* v. *Dorr,* 246 Fed. 163). It holds that Congress intended to place the holdings of federal reserve bank stock upon the same basis as holdings of government bonds, which the supreme court has held not deductible.—*First Nat'l Bk.* v. *Beaman,* 257 Fed. 729.

CORPORATION FRANCHISE TAX—INTERSTATE COMMERCE—RIGHT TO SUE.—In a recent case arising under the Michigan act governing permission to foreign corporations to transact business in that state, the federal circuit court of appeals reviewed in detail the leading decisions bearing upon the subject, most of the later ones having been heretofore noted in the BULLETIN. The opinion is interesting and instructive by reason of the full discussion of these cases and of their application to the particular facts in this case. The question at issue was as to the right of an Ohio corporation, engaged as a sales agency, with main office in Michigan, in selling automobile parts to customers in that state and in numerous other states, to recover on a contract made with a Michigan corporation, when the selling corporation had not complied with the Michigan statute requiring a permit from foreign corporations, with payment of graduated license fees, as a prerequisite to the maintenance of such an action.

The claims on behalf of the Ohio corporation were that the statute was inapplicable to it because of interference with interstate commerce and that its application involved an arbitrary and unreasonable exercise of the taxing power contrary to the due process clause. The court sets forth in detail, with elaborate reference to the decided cases, the state of the law governing the subject and the limitations upon

state control of corporations engaged in state and interstate commerce, its conclusion being that the act in question, as construed by the state court, was not intended to burden interstate commerce nor did it in the instant case, have that necessary effect; it holds that the state and interstate business could be separated and that only the state business was the subject of the tax.

Recovery upon the contract was therefore denied, and as the fact that the corporation had complied with the statute some years after the date of the contract, had been held by the state court not to cure the delinquency, this holding was binding upon the federal court. — *Hayes Wheel Co.* v. *American Distributing Co.,* 257 Fed. 881.

Involuntary Payment — Recovery — Duress. — A helpful discussion of what constitutes duress such as to authorize the recovery of an illegal tax paid under protest, is found in a recent California decision.

Plaintiff, a telephone company, paid license taxes demanded by a city, after a decision by the state supreme court that such taxes were unauthorized, being threatened with the consequences of refusal by reference to the penalties provided for non-payment which included fines and imprisonment. The court, after referring to the general principles governing payment under duress, held that the evidence in the case brought the payment in question within the class of involunary payments and sustained the recovery.—*Home Tel. & Tel. Co.* v. *City of Los Angeles,* 181 Pac. 100.

Special Assessments — Drainage Taxes—Railroad Property.—The validity of assessments levied in a drainage district against railroad property to cover the expense of constructing drainage ditches, was assailed by the railroad upon the ground that they were fixed arbitrarily and upon a wrong theory and were greatly in excess of the taxes assessed against adjoining farm lands. The assessing board had determined the amount of the railroad assessment by considering the cost to the railroad of a drainage system which would produce a similar benefit, while the assessments against the farm lands were fixed upon the basis of their increased value due to the drainage. This method was held not erroneous and the assessments were confirmed. — *Northern Pac. Ry. Co.* v. *County Commissioners,* 181 Pac. 868.

Inheritance Tax. — The inheritance tax law of Washington (Rem. Code, §§ 9182, 9183, L. 1917, ch. 43) was recently construed to impose a tax upon the right to receive rather than upon the property or the right to transmit, and hence the tax should be computed and the graduated rates applied with respect to each share and not to the whole estate. — *In re Corbin's Estate,* 181 Pac. 910.

Inheritance Tax — Antenuptial Agreement. — The shares of an estate going to children, pursuant to an antenuptial agreement, was held to be a transfer by gift, intended to take effect after the death of the decedent, and was hence subject to the inheritance tax of New York (Tax Law, sec. 220, sub. 4). — *In re Schmoll's Estate,* 177 N. Y. Supp. 670.

Poll Tax, Payment of as Qualification to Vote—Woman Suffrage. — An act of Tennessee (Ch. 139, Acts 1919) conferred upon women the right to vote for presidential electors, municipal officers and upon all questions submitted to the electors of municipalities. This act was assailed as impliedly unconstitutional because, among other reasons, voters were required by a constitutional provision to produce evidence of payment of poll tax and by another provision, male citizens were made liable to a poll tax. It was claimed that there was an implied limitation upon the power to levy a poll tax upon females, and hence the act caused a discrimination by permitting them to vote without payment of poll taxes. The court rejected this claim upon the ground that no limitation of the taxing power could be implied; that the legislature had the power to impose a poll tax upon females and that the act in question did not concern itself with that matter. Whenever such an act was passed females would be required to produce evidence of payment as a prerequisite to voting. — *Vertrees* v. *State Board of Elections,* 214 S. W, 737.

Situs—Tangible Property—Vessels —Penalties. — The Texas court of civil

appeals held in a recent case that under the constitution of that state, personal property such as vessels, dredges, and horses and wagons, which were not located in the city of Galveston, the residence of the owner, could not be taxed there and that the mere enrollment of vessels at the port of Galveston did not give the city the right to tax them.

It was further held that no interest or penalties could be collected, as the collector declined to accept payment of taxes on that part of the property admitted to be properly taxable in the city.—*Galveston* v. *Haden,* 214 S. W. 766.

INDIAN RESERVATIONS—SCHOOL TAXES.—Defendant, residing on the unceded portion of Indian lands, resisted payment of school taxes in a school district which included territory in both ceded and unceded portions of said lands, claiming that the state had no authority to exercise governmental functions within Indian lands. The court rejected the claim, holding that the school board was within its authority when it included a portion of the unceded Indian reservation within the boundaries of the district and that defendant's property was properly assessed for the maintenance of schools within said district.—*Lebo, County Treasurer* v. *Griffith,* 173 N. W. 840.

FRANCHISES—INTANGIBLE PROPERTY—RIGHT OF EMINENT DOMAIN.—The constitution of Utah defines property as including "franchises." A smelting company, organized under the laws of Montana, was assessed for its plant a certain sum and a further assessment was made for "franchise." It was contended by the assessor that the right of eminent domain granted to such a company was such a franchise as was taxable under the constitution and laws of the state. The company contested the assessment. It appeared that the company had never exercised the right of eminent domain and the court held that the mere unused right, did not partake of the ordinary attributes of property. It was not transferable and could not exist apart from the particular corporation and to it only so long as it was conducting the business specified; that it was not the intent of the framers of the constitution to subject the naked right of eminent domain to taxation. A prior decision of the court in *Black Rock Min. Co.* v. *Tingey,* 98 Pac. 180, holding that the franchise to exist as a corporation was not subject to taxation, was cited as strongly in point.—*International Smelting Co.* v. *Tooele County,* 182 Pac. 841.

UNIFORMITY—"TAXATION"—REVENUE MEASURE—MOTOR VEHICLE TAX.—In a recent Colorado case it was held that the uniformity provision in the constitution related only to taxation in the commonly accepted meaning of that term, by assessment, levy and collection, and did not apply to licenses or registration fees; that while such fees are taxes upon privileges, they are not taxes upon property. Further objection to the act in question, which imposed license fees on motor vehicles, was that it was an attempt under the police powers of the state to pass a revenue measure. This objection was overruled, the court holding that the principal object was regulation and that the incidental production of revenue did not make it a revenue measure.—*Ard* v. *People,* 182 Pac. 892.

HOME RULE—"LOCAL CONCERN"—SPECIAL ASSESSMENTS—COUNTY PROPERTY.—Of interest on the general question of the extent of the taxing power residing in a city under its charter, is the holding in a recent Colorado decision that where the constitution, as interpreted by the courts, gave a city the right to assume by its charter, any powers which were local and municipal or "of local concern," the city would be authorized to levy assessments for local improvements. It was further held that special assessments could be levied by the city against county property situated therein; that a county is not a sovereign in such a sense as to exempt it from such assessments.—*El Paso County* v. *City of Colorado Springs,* 180 Pac. 301.

REAL ESTATE—VALUATION—REVIEW.—In a California action brought to recover taxes paid under protest, it was claimed, among other things, that the action of the board of equalization in raising the assessment was arbitrary and without evidence to sustain it and that the valuation was made improperly. The court, in sustaining the assessment as in-

creased, held that under the statute applicable, the decision of the board of equalization was final and conclusive on the courts in the absence of fraud or unless so grossly excessive as to be inconsistent with an exercise of honest judgment, citing among other cases, *Pittsburg &c. Co.* v. *Backus,* 154 U. S. 421, and *Stanley* v. *Supervisors,* 121 U. S. 535. The plaintiff contended that the value of the property should be determined by the rental it was producing as a stock ranch. The court below declined to be thus limited and the appellate court sustained this position, holding that "in arriving at the value of land *all* its capabilities, or the uses to which it is adapted, should be taken into consideration."—*H. & W. Pierce* v. *Santa Barbara County,* 180 Pac. 641.

Illegal Tax—Recovery.—In a recent case the Kansas court, following its previous decision in *Railway Co.* v. *City of Humboldt,* 123 Pac. 727, held that where the taxpayer pays an illegal tax under duress it is to be regarded as involuntary and he may recover it back, but when a tax is payable in two instalments, if he pays the whole tax at the time the first instalment is due, in order to secure a rebate, the advance instalment is deemed to be voluntary and is not recoverable.—*Bush* v. *City of Beloit,* 181 Pac. 615.

Residence — Intangible Property.—Helpful discussion of the difficulties of "residence" and "domicile" as establishing the taxable situs of intangibles, is contained in a recent Kentucky case involving a controversy over the taxation of the intangible property of the estate of a decedent who, in his lifetime, was accustomed to spend portions of time in Kentucky where he owned a farm and tangible personalty. The court distinguishes between residence and domicile and observes that "one may have more than one residence, but he can have but one domicile or home."—*Millett's Executors* v. *Commonwealth,* 211 S. W. 562.

Inheritance Tax — Equitable Conversion. — A resident of Maryland died leaving a will which directed that certain real estate, situated in California, should be sold and the proceeds distributed as directed in the will. The state of Maryland sought to collect a tax upon the value of this real estate upon the theory of equitable conversion. The court denied the contention, holding that the doctrine of equitable conversion was not applicable to inheritance taxes, citing authorities from other jurisdictions. It is noted that the courts of Pennsylvania alone take the opposite view (*Re Handley's Estate,* 37 Atl. 587).—*State* v. *Fusting,* 106 Atl. 690.

Uniformity — Inequality — Full Value.—A recent case, arising in Florida, disclosed a course of action on the part of the local assessors which, while grossly contrary to the law and the constitution, is illustrative of a common practice in jurisdictions where the assessment of property is left wholly to local authorities, without the supervision of a state commission.

In this case the complainant, a corporation, alleged unjust, unequal and discriminatory assessment of its property as ground for relief by injunction to restrain the sale thereof for unpaid taxes. It appeared that the assessor had adopted a method by which the assessments of lands of individual residents in the county were fixed at arbitrary rates per acre, no regard being paid to the existence of buildings or improvements, while the property of corporations and non-residents was assessed upon other bases, without regard to any particular known facts as to the elements of value in the land and, as alleged by the complainant, arbitrarily and by "guess work." It appeared that there was no attempt to assess any property in the county at full value as required by the constitution and the statutes, but it was assessed at fractions thereof. One of the allegations of complainant was that this rendered the assessment complained of illegal. The court described in detail the action of the assessor, which it characterized with most emphatic denunciation.

The claim of illegality was, however, denied, upon the general grounds brought out in the recent Kentucky cases (244 U. S. 499). The discussion of the meaning of full value in the assessment of property and of its bearing upon the question of equality, is well expressed, as is the effect of systematic, arbitrary and intentional under-valuation such as to justify the intervention of a court of equity. The proof in the case was found to clearly establish

that the system of assessment adopted and systematically and intentionally pursued was unjust, arbitrary and discriminatory and in contravention of the cardinal principles of equality and uniformity in taxation required by the constitution and laws of the state. This decision, with its vivid description and characterization of the assessment of property in this county, would seem to be of great value towards the movements for reform which are gradually shaping themselves in the state, as evidenced by the formation recently of the Florida Taxpayers Association. — *Camp Phosphate Co.* v. *Allen,* 81 So. 503.

Licenses — Reasonableness — Interstate Commerce.—A license tax imposed by a Nebraska municipality upon a telegraph company, was resisted as unreasonable and a burden upon the interstate commerce business of the company. Evidence of two years' operations was introduced, showing that the intra-state receipts were insufficient, after payment of other expenses, to pay the tax; that the office in question was conducted at a loss and that the tax would thus be payable from interstate receipts. The court held that the reasonableness of such a tax did not depend upon whether it worked a hardship in an isolated case but upon its general operation on the class (citing 203 Fed. 537; 63 S. E. 138); that proof of two years' operations was insufficient, without showing further facts as to the character of the business. On the question of the alleged interference with interstate commerce, the court announced the novel argument that any deficit arising from the payment of a tax on the privilege of doing an intra-state business within a municipality becomes a charge on revenue from the intra-state business as a whole, and hence does not become a burden upon the company's interstate business merely because the amount imposed by the municipality is greater than the company's net receipts in that municipality from intra-state business. — *City of Fremont* v. *Postal Telegraph-Cable Co.,* 172 N. W. 525.

Situs—Intangible Property.—In two recent Texas cases the court of civil appeals held that the provisions of an act declaring the personal property of certain corporations taxable at their home office, were in conflict with the constitution when sought to be applied to securities deposited by an insurance company with the state treasurer pursuant to requirement of law, such securities apparently being held to partake of the nature of tangible property and thus to be "situated" at the office of the state treasurer and taxable there as provided in section 11 of article 8 of the Constitution, the property being referred to in the opinion as "physical and tangible property, such as promissory notes and other tangible securities which the law requires these companies to place with the state treasurer as a condition precedent to doing business." The decision of the Texas supreme court in *Guaranty Life Ins. Co.* v. *Austin,* 190 S. W. 189, is cited as controlling. — *American Indemnity Co.* v. *City of Austin; Texas Fidelity & Bonding Co.* v. *Same,* 211 S. W. 812, 818.

Corporation Franchise Tax — Computation of — Business Transacted.—In a Kentucky case a foreign corporation owning property and doing business both within and without the state objected to the method of computation of the tax adopted by the Tax Commission upon the ground that the words "business transacted" meant the gross income, whereas the Tax Commission's contention was that these words were sufficient to designate or describe any business carried on. It therefore, in computing the tax, included in the fraction not only the gross income both in and out of the state but also the total amount of purchases within and without the state. The court, while admitting that the ordinary meaning of the words "business transacted" is usually expressed by figures representing the gross income, the words were not used in the statute in their arbitrary or general significance but in their legal sense, and hence covered every form of business transacted within the state. It therefore sustained the action of the Tax Commission in including gross purchases, thereby raising the fractional part of the capital stock employed in the state as contended for.—*H. Lorillard Co.* v. *Scott,* 212 S. W. 145.

Home Rule—Power to Tax—Authority of Municipal Corporations — Licenses—Income Tax.—The authority of a city under its charter to impose license

taxes upon occupations was recently brought in question in an Ohio case, in which the court took occasion to announce certain fundamental considerations with respect to the power of taxation vested in the state and in the municipalities thereof. The question arose by reason of an ordinance adopted by the city of Cincinnati, providing an occupation tax, the legality of which was contested by one of the subjects thereof. The court announced the general doctrine that the authority of a state with respect to taxation is unlimited except as specified in the constitution and found that the constitution in question contained no limitations other than such as applied to property taxes which were held not to be applicable to license and occupation taxes. The question then arose as to the power of the city to enact the occupation tax in question. The charter of the city contains the general provision that it shall have "all powers of local self-government and home rule," and the constitution of the state provides that "municipalities shall have authority to exercise all powers of local self-government." This language in the constitution was held to be as complete a grant of power to the city as resided in the General Assembly, the court observing that "there can be no doubt that a grant of authority to exercise all powers of local government includes the power of taxation, for without this power local government in cities could not exist for a day," and this general authority was held not to have been limited by the General Assembly either expressly or impliedly by invading the field on its own account by the imposition of state occupation taxes. The conclusion of the court was that the ordinance was a valid exercise by the city of its legislative power so long as the state itself did not impose such taxes.

An interesting suggestion is made which has a bearing upon the present agitation in Ohio for a state income tax. Some doubt has been expressed as to the effect upon such a tax of Section 9 of Article 12 of the constitution which is as follows: "not less than fifty percentum of the income and inheritance taxes that may be collected by the state, shall be returned to the city, village or township in which such income and inheritance tax originate." Persons interested in the matter, foresee a difficulty with an income tax which is subject to this limitation. The court indicated that the limitation in question means that the state alone can initiate income taxes. The court takes occasion to announce a general conclusion that the power to impose an income tax would exist without special constitutional or statutory authority and that such taxes are not subject to the uniformity clauses of the constitution, not being property taxes, but being in the nature of excises.—*State* v. *Carrel, Auditor,* 124 N. E. 134.

Munition Manufacturers' Tax — Manufacture of Parts. — In an action brought against the collector of internal revenue by a steel company which manufactured billets for shells, piercing the billets so as to make rough forgings being equivalent to 40 per cent of the work necessary to complete the shells, the question presented was whether section 301, providing an excise tax on manufacturers of "shells of any kind . . . loaded or unloaded, or any part of these articles," was applicable. It was held that the tax is laid, not as a tax upon the shell or any part of the shell, but as an excise tax upon the business of manufacturing shells, and that Congress intended to impose the tax upon the business of manufacturing in all or any of its stages, from the first step to the last, of the manufacturer who produces the shell, or any part of it, and hence the plaintiff was liable for the tax. — *Worth Brothers* v. *Lederer,* 256 Fed. 116.

Corporation Excise Tax — Income "Received."—In two insurance company cases it was held that only premiums actually received in cash during the year, and not premiums accruing or becoming due and not paid, constitute income "received" by a mutual insurance company within section 38 of the Excise Tax Act of 1909; that an estimation on a cash basis as distinguished from a revenue basis, was contemplated by the act; that the increase or decrease in the book value of bonds held as an investment does not affect income received within the year. — *Lumber Mutual Fire Insurance Company* v. *Malley* (two cases), 256 Fed. 380, 383.

Internal Revenue—"Assessment"—Recovery of Taxes.—In an action to recover income taxes erroneously assessed

and paid, it was held that an assessment is not necessary to the enforcement of a federal internal revenue tax. Therefore, the recovery should be upon the basis of the corrected assessment as found by the court, regardless of incorrect deductions made by the Department in assessing the tax, and the collector is not estopped from claiming as an offset against income illegally included, tax on amounts incorrectly allowed by the Department as deductions. — *New York Life Insurance Company* v. *Anderson,* 257 Fed. 576.

Tax, when an Obligation. — Under the New York charter providing that a person's taxable situs shall be fixed on October 1, and that the tax shall be payable on May 1, an executor of a person dying after October 1, and before May 1, is liable for a personal property tax assessed as of October 1. — *In re Tweed's Estate,* 176 N. Y. Supp. 699.

Internal Revenue—Federal Estates Tax Chargeable against Residuary Legatees. — In affirming the decision of the lower court, the New York court of appeals construed the federal estates tax as imposing a tax on the estate and held that the tax constituted a charge against the residuary legatees, no part of it being chargeable against specific legacies. The appellants argued that the language of certain sections disclosed an intention that the tax should be apportioned pro rata among all legatees. The court, upon an examination of the legislative history of the act, observed that to hold that Congress intended by implication to provide that the tax imposed was one upon legacies, would not only violate the clearly expressed intent but would require the court to ignore the historical facts surrounding the consideration of the measure.—*In re Hamlin,* 124 N. E. 4; see also Bul. IV, 131.

Inheritance Tax—Non-Residents—Classification. — The recent decision of the United States Supreme Court, sustaining by a divided court—five to four—the New Jersey inheritance tax as applied to the estates of non-residents within its jurisdiction, may well create a sense of uneasiness and uncertainty in those who already see much difficulty in establishing substantial respect for interstate comity in state legislation.

By the act in question (P. L. 1914, p. 267) the transfer of certain property of non-resident decedents, within the jurisdiction of New Jersey, is made subject to a tax bearing the same ratio to the total tax which would be levied upon the entire property of the non-resident if he were a resident, as the property in question bears to the entire property.

In the cases under review the statute was attacked as imposing a tax in violation of par. 1, sec. 2, Art. IV of the federal constitution and of sec. 1 of the fourteenth amendment. These claims were based upon the fact as alleged, that the application of the statute would impose a greater tax upon non-resident than upon resident decedents, for the transfer of an equal amount of property.

The court refers to Art. IV as intended to prevent discrimination by the several states against citizens of other states in respect to the fundamental privilege of citizenship and, quoting from Cooley's *Limitations,* 7th Ed., p. 569, suggests that among such privileges is the right of a non-resident to be exempt from taxes to which residents are not subject, citing *Paul* v. *Virginia,* 8 Wall 168, 180; *Ward* v. *Maryland,* 12 Wall 418, 430. It observes further that the privileges and immunities guaranteed by the fourteenth amendment were limited by the decision in the *Slaughter House cases* (16 Wall 36, 72-79) to such as owe their existence to the federal government, its national character, its constitution or its laws, and that the amendment is not to be deemed to secure and protect those civil rights that inhere in state citizenship (*Duncan* v. *Missouri,* 152 U. S. 377, 382). These rights of state or United States citizenship are held not to be abridged by inheritance tax statutes.

The claim of want of due process is met by the description of the tax as a privilege tax and not a tax on property, and the rule that in such taxation, property not in itself taxable may be used as a measure so long as there is not in fact an assumption of jurisdiction over property not taxable by the state. The crux of the decision is found at this point where the right to classify non-resident estates appears to be definitely upheld. The court says:

"To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to

distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it."

Further on the court observes that there are substantial differences which, within settled rules, permit the classification made by the statute, citing *St. L. S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 367.

Having thus recognized the right to such a classification in state inheritance taxation, the court easily disposes of the remaining objection of denial of equal protection by the suggestion that there are substantial differences between the classes and that the effect of the application of the statute is not so wholly arbitrary and unreasonable as to be beyond the authority of the state. The discussion here is of interest as bearing upon the possible attitude of the court towards the discrimination alleged to exist in the New York income tax case soon to be argued before the court. They refer to the impossibility of devising a classification which will not have loopholes. Some will be caught while others escape. This does not condemn a classification so long as no hostile discrimination exists. The court observes:

"The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

The citations here are *Beers* v. *Glynn,* 211 U. S. 477; *Board of Education* v. *Illinois,* 203 U. S. 553; *Campbell* v. *California,* 200 U. S. 87; *Keeney* v. *Comptroller,* 222 U. S. 525.

The judgments of the state courts in both cases are affirmed.—*Maxwell et ano, Executors,* v. *Bugbee, Comptroller,* and *Hill, Administrator,* v. *Same,* U. S. Sup. Court, October 27, 1919. See BULLETIN, II, 180.

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A revision of a booklet relating to ownership certificates, issued in 1918.

BLAKEY, ROY G., and GLADYS C., The revenue act of 1918. *American Economic Review.* IX, p. 213, ff.

A detailed description of the various parts of the latest federal revenue legislation. The authors express regret that an even greater part of the war expenditure was not provided for by taxation instead of by borrowing. Larger levies upon war profits should have lessened the need of further loans.

BROWN, HARRY GUNNISON, The theory of earned and unearned incomes. The Missouri Book Company, Columbia. 1919.

"Challenges the theory of Marxian socialists that all incomes from property are, solely because derived from property, 'surplus value,' and unearned, insisting upon distinctions between different kinds of incomes from property, which orthodox socialists ignore."

BUREAU OF INTERNAL REVENUE. Internal revenue collections for the fiscal year, 1919; preliminary statement, September 6, 1919. 12 p.

BUREAU OF THE CENSUS. Financial statistics of states, 1918. Washington, 1919. 123 p.

BUREAU OF THE CENSUS. Financial statistics of cities having a population of over 30,000, 1918. Washington, 1919. 357 p.

BURTON, H. J., Valuation and depreciation of city buildings. A compilation prepared for the Real Estate Taxation Committee of the National Association of Building Owners and Managers. 127 p.

This document consists of extracts from the opinions of leading authorities on this subject. Its value as a reference work is very greatly diminished by the absence of table of contents and index, and by the lack of critical and comparative treatment of the material presented.

DAVENPORT, H. J., The war tax paradox. *American Economic Review*, IX, p. 34, ff. (March, 1919).

An examination of Mill's doctrine that war may cause a two-fold burden, or double burden, to fall upon labor. Despite the weakness of his devices of technical analysis, his conclusions were significant. Labor may have to bear a double burden,—first, a burden caused by the decline of real wages due to inflation and to the withdrawal of current supplies for war uses; and second, the burden of taxes necessary to repay the bonds issued to finance the war.

ESTCOURT, ROWLAND. The conflict of tax laws. California University *Publications in Economics,* IV, 3 (April, 1918). pp. 115-231.

FRIDAY, DAVID, Statistics of income. *American Economic Review,* IX, p. 502, ff.

A review of the bulletin relating to statistics of income issued under the direction of the Commissioner of Internal Revenue.

GEPHART, WILLIAM F., An analysis of the operation of the general property tax in Missouri. Washington University Studies, VI, Humanistic Series, 1, p. 3-25. 1918.

This is a practical investigation of the actual workings of the general property tax and thus differs from the usual more or less theoretical treatment of this subject. It is interesting to have the results shown in actual figures rather than by argument and discussion. The subject is divided to show results of tax collections, cost of administration, relation between real estate and personal property, between the general property tax and other taxes and licenses, relation of the assessed valuation of real estate to its selling value, of the assessed valuation of personal property to its true value, and of the assessed valuation of real estate and personal property to the population.

The author states in a note, that the paper is based upon "an unpublished thesis by J. D. Luther, presented in partial fulfilment of the requirements for the degree of Master of Arts. All the data are taken from the official records of St. Louis County which, adjoining the city of St. Louis, represents for taxation study the most urban, as well as the most rural conditions. The writer of the thesis is not only a careful and mature student, but has had experience as a tax official. The thesis is one of the most intensive studies known to the writer of this discussion."

ILLINOIS. First state budget, 1919. 187 p.

In addition to the tabular statements, this document contains some interesting recommendations for further improvement in the methods of state financial administration. Among these are proposals for reducing the number of appropriation acts, for standardization of salaries and employments, for the enactment of a finance code, and some extensions of the sources of revenue.

KAHN, OTTO H., Taxation as a factor in high living cost. *Commercial and Financial Chronicle,* Sept. 6, 1919, p. 932.

Advocates a special commission to study the effects of various kinds of war taxation and recommend changes.

MCKAY, CHARLES W., Depreciation and federal income tax. *Industrial Management,* LVIII, p. 148, ff. (August, 1919).

The problems which have arisen under the federal taxes have created a new profession, which, for lack of a better term, is called "tax engineer." This article outlines the federal rules for depreciation and presents convenient tables and forms for their application in practice. The value of proper tax appraisement is emphasized.

MAINE. Twenty-eighth annual report of the Board of State Assessors. 1918.

MARYLAND. Tax laws of Maryland. A compilation of the statutes relating to taxation, arranged in accordance with the code of public civil laws, together with constitutional provisions and references to decided cases. Issued by the State Tax Commission, 1919. 129 p.

MASSACHUSETTS. Report of the Joint Special Committee on Taxation. 1919.

"Part I of this report contains a discussion of the taxation of domestic and foreign business corporations and a description of the legislation recommended.

"Part II relates to the present and proposed methods of distributing the income tax revenue and to various measures affecting the assessment of taxes.

"Part III presents corrections to the detail of the tax laws."

MASSACHUSETTS. Report of the Special Commission on Education. 1919.

Contains, among other things, a suggestion for the creation of a general school fund whereby the state shall appropriate annually approximately $4,000,000 from the proceeds of the state income tax for the support of schools throughout the state. The distribution is to be made in such a manner as will permit the employment of more teachers and the payment of better salaries.

MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION. A proposed act to create a board of estimate and taxation for Minneapolis.

This act was passed at the last legislative ses-

sion. The board provided is a very important agency in the development of a sound budget system for the city.

MASSACHUSETTS. The new Massachusetts business corporation excise tax. First National Bank of Boston. 1919. p. 57.

Text of the law, with an explanatory treatise by Henry Herrick Bond.

MINNESOTA. Assessors' manual, including assessment laws with questions and answers relating thereto. Minnesota Tax Commission, 1919.

This is a combination of the assessment laws with the manual of instructions, which have hitherto been issued separately. The catechism style is used, and each paragraph of the law is followed by the appropriate questions and answers. It is a very useful document for the taxpayer as well as the official.

MINNESOTA. Questions and answers relating to tax laws. Chapter XI of the fifth biennial report of the Minnesota Tax Commission. St. Paul, 1916. 45 p.

NATIONAL BUDGET COMMITTEE. This organization, with headquarters in Washington, has begun the issue of a bi-monthly publication, entitled "The National Budget," and devoted to the promotion of the reform of budgetary procedure in the federal government. The first two numbers of volume I have been received.

NATIONAL CITY COMPANY. Suggestions for the consideration of taxpayers when making ready for returns of income and closing the books for 1918; and preparing balance sheets and profit and loss statements for income tax and other purposes. New York, 1919, 11 p.

NEW YORK. The A, B, C of the personal income tax law. Eugene M. Travis, State Comptroller. June, 1919, 48 p.

This bulletin contains the text of the new personal income tax law, together with a series of preliminary rulings by the comptroller, in the form of a series of questions and answers.

OHIO. Annual report of the president of the Cleveland Association of Building Owners and Managers. Cleveland, 1919. 10 p.

This includes a brief account of the work of the Association in furthering the cause of the income tax in Ohio.

OHIO. Ninth annual report of the Tax Commission of Ohio, for the year ending December 31, 1918. 240 p.

The principal responsibility of the Ohio tax commission is the assessment of the public utility companies, and this function is on the whole very well performed. The commission has been rather conservative with regard to the other important financial problems in the state. It upholds the present tax-limit law, but offers no constructive suggestions by which the financial difficulties produced by this law may be solved. It is inclined to decry public extravagance, but does not suggest any remedies, nor even the need of constructive budgetary reform. With one phase of the problem the commission has now discretionary power to deal, namely, the assessed valuation of real estate. At the last session of the legislature a law was passed authorizing the commission to order reassessment of real property locally assessed. By this means the commission may be able for a while to save the Smith law. No notice is taken of the fact that this law has really failed in the fundamental object of its enactment, which was to induce a complete listing of intangibles. The grand duplicate shows increases in the intangible items, but these amounts are, after all, only suggestive of the quantity that is escaping.

OHIO TAXPAYERS LEAGUE. Classification versus uniformity.

A pamphlet prepared as a reply to the charges advanced against the proposed classification amendment by the Ohio Home Protective League, an organization promoted under the auspices of the Ohio Grange.

SELIGMAN, E. R. A., Are stock dividends income? *American Economic Review,* IX, p. 517, ff. (September, 1919).

A careful economic analysis of the concepts of income and capital, from which the conclusion is reached that an appreciation or increment of capital is income only when separated or realized. "The increment when separated is income; the increment unseparated remains capital. Separation and realization are of the essence of the transmutation of capital into income." In the stock dividend there is neither separation nor realization, and hence the gain from a stock dividend is not income.

OHIO TAXPAYERS LEAGUE. The classification of property for taxation. A handbook of reference prepared under the direction of Harley L. Lutz. Columbus, Ohio. 1919. 64 p.

SWEET, HOMER N. Federal taxes in relation to business. *Journal of Accountancy,* XXVIII, p. 121-125 (August, 1919).

The practice which should govern the policy of corporations with respect to taxes is summarized as follows:

"1. All possible care should be taken to determine the correct amount of tax which would be

imposed under a reasonable interpretation of the law.

"2. The balance-sheet for the end of the fiscal year should include, as a separate item among the quick liabilities, the amount of federal income and excess profits taxes assessable on the net income earned to that date.

"3. The balance-sheet for any other date than the close of the fiscal year should include, as a separate item among the quick liabilities, an amount representing estimated taxes accrued for the current year.

"4. The balance-sheet for any date should designate the act under which the liability for federal taxes was calculated.

"5. Funds to meet taxes should preferably be invested temporarily in certificates of indebtedness. In no event should funds required for taxes be distributed in dividends or invested in fixed assets."

WISCONSIN. Second annual report on the statistics of municipal finances. Wisconsin Tax Commission, Madison, 1918. 124 p.

These statistics relate to the financial activities of the state and its several political subdivisions for the year 1917. The outstanding feature of the report is the striking increase in the cost of government in recent years as shown by comparison of expenditures for 1912 and 1918. Another important tendency disclosed by the report is the increasingly large expenditures of cities as compared with other political units. Everywhere the outlays for schools and highways, charities and corrections, sanitation and health, are rapidly increasing. 60.8 per cent of the total disbursements for the respective fiscal years ending during 1918 went for these purposes. The report contains numerous graphs and statistical tables.

WOODWORTH, LEO DAY, Tax exemption evils. *Journal of the American Bankers Association,* XII, p. 135, ff. (September, 1919).

Criticizes the present tendency to extend tax exemption to various issues of public securities, and points out that this practice will inevitably increase the tax burden on unexempt property. The author concludes that it is far better that "existing exemptions should be repealed than that this unscientific, confiscatory and inequitable method of granting preferment at the public cost should be extended."

YALE LAW JOURNAL. The taxation of car companies doing interstate business. Editorial comment. XXVIII, p. 802 (June, 1919).

Reviews the methods in use; indicates the doubtful legality of many, and approves the Connecticut statute of 1918, whereby the tax is levied on that part of the gross earnings which the miles run by cars in the state bear to the total car mileage.

THE NATIONAL TAX ASSOCIATION

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ZENAS W. BLISS, Chairman Board of Tax Commissioners of Rhode Island, *Vice-President*

ALFRED E. HOLCOMB, Assistant Secretary American Telephone and Telegraph Company, *Secretary and Treasurer*

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"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

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DEFEAT OF CLASSIFICATION IN OHIO

The defeat by the people of Ohio, of the classification amendment to the constitution, submitted to the voters at the November election, seems to us to be easily the most important event in recent years. We say this because of its bearing on tax progress in general and because it raises questions which require serious consideration.

We had come to view the desirability of constitutional freedom as a self-evident proposition and had assumed that whenever the question was thoroughly understood, the voters would not fail to appreciate the need of such freedom, if practical, equitable, and effective tax laws were to be secured. And especially was it to be expected that this would certainly be appreciated in Ohio, which has suffered so long from the consequences of tax laws which bore inevitably with great severity upon a single class of property, real estate. The question has been thoroughly discussed in many campaigns, so that the submission of the amendment cannot be said to have placed before the voters a new question which they would require time to consider, and which, for lack of such time, they would reject on general principles.

The rising costs of government, with the certainty of further demands upon real estate, the general recognition of the inequity of attempting to further burden that source, as shown by the recent resort to income taxation in the states of New York, Massachusetts, Missouri, New Mexico, Delaware, North Dakota and Alabama, and by the adoption or the perfecting of methods of classification in Virginia, Louisiana, Minnesota, South Dakota, Montana and elsewhere — all these circumstances seemed to lead to the conclusion that certainly at this time, the relief from rigidity and from the narrow base of taxation, afforded in Ohio, would be eagerly grasped.

With such thoughts as these, we survey the defeat of the amendment, by approximately 100,000 majority, with mingled feelings of surprise and dismay and are easily led to question our senses; to wonder whether, after all, our established notions are unsound, what there really is back of the hesitancy to even permit the legislature of a great state to have freedom to consider how best to impose taxes under present-day conditions, why it should be bound by limitatons imposed in 1850 under conditions as they then existed.

With the hope of finding some solution of these questions and of removing to some extent the doubt and uncertainty as to the meaning of the result, we took occasion to address a letter of inquiry to the Ohio members, aimed to secure some rational explanation of the puzzling situation and to afford a basis for reviewing the merits of the question in the light of its defeat and in view of the almost certain attempts which will be made in other states to secure additional revenue to meet the enormous expenditures before them. It was thought that the observations of those who have given study and thought to the matter, would be of great value to the entire membership and would prove helpful in other states where tax changes are in contemplation.

Our letter to the Ohio members was as follows:

"To Ohio Members of the National Tax Association:

"The result of the election in Ohio on the classification amendment seems at once so absolutely decisive and so utterly discouraging to a stranger interested in tax progress, that he naturally feels like recasting his opinions as to classification.

"In other words, that a proposition which seemed so necessary and so entirely free from objection as to leave no reasonable ground for dispute, could be overwhelmingly defeated in a state where it was not a novel suggestion, is disturbing.

"It occurs to me that a summary of the views of our Ohio members as to the reasons for the defeat of this measure, published in the Bulletin, would be of interest and help to those in other states who are working for equitable taxation and who wish to act along practical lines.

"Your cooperation in this plan would be appreciated. No names will be published."

To date, a dozen or more replies have been received from members personally known to the secretary to be thoroughly interested in the tax problem, and desirous of doing what is best for the state in the interest of fairness and equity. These replies are so genuine and evince such a general purpose to explain the result as each interprets it, that we are satisfied that we have about all there is to be said on the matter.

Before summarizing these replies, we deem it wise to state the exact wording of the constitutional provision as it now appears and as it was proposed to amend it.

Section 2 of Article 12 now reads in part as follows:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money. . . ."

It was proposed to amend this language to read as follows:

"All property shall be taxed by such rules and methods and in such classes as may be provided by law. The rules and methods shall be uniform within the classes so established."

Thus the change proposed was practically from the absolute *requirement* to tax all property by the same rules and at the same rate, to the *permission,* if the legislature should see fit, to tax it by classes, at rates uniform within the class.

We find in the first letter to be noted, written by an opponent of the amendment, practically the whole position of the opponents. This letter is so wholly fair and reasonable and so clearly states or suggests the objections, evidently thoroughly convincing to the writer and doubtless reflecting the general attitude of the opposition, that we give it practically in full, with only such changes as seem necessary to protect the identity of the writer who has not been asked for permission to publish. The letter follows:

"Answering your letter asking my opinion as to the reasons for the defeat of the proposed amendment, I write to state that an answer to your inquiry cannot be given in a brief letter.

"In ——— County, we are blessed with one of the ablest taxing officials in the United States. Mr. ——— is succeeding so admirably in increasing the present duplicate that he has disproved the statement that the uniform rule is a miserable failure. For example, our personal duplicate has increased in recent years from $31,000,000 to about $500,000,000.

"There is no question but what this ——— needs more revenue and the figures clearly demonstrate that if we were to adopt the rates prevailing in Kentucky and some other states, our personal duplicate would be decreased. Many of us feel that the results obtained in other states have been due to a change of system, quite as much as the adoption of so-called classification. Also many feel that evasion and tax-dodging exists to no greater degree in this county than in states having classification.

"The lack of success of the proposal was due in a large part to the fact that the so-called reform was led by a group composed of stock-and-bond brokers and single-taxers. This naturally alarmed the owners of real estate and their suspicions became convictions when the group insisted upon the proposal being worded in a manner that gave the people of the state no idea as to the type of taxation that would result. For example, if the adoption of the proposal would

have compelled the legislature to adopt the Model System of Taxation, the proponents would not have met with such violent opposition.

"Many would be willing to see property classified for taxation into tangible and intangible, provided the constitution prevented the legislature discriminating between the owners of tangible property, but apparently a majority of the persons in this state are not prepared to grant to the legislature the power to classify in any manner it desires. I was one of those who opposed the proposed change. Although I am willing to see some change made in our present constitution, I cannot forget that Ohio has prospered tremendously since the uniform rule was adopted, and that we therefore should not abandon the protection accorded by this rule until a substitute is offered that is clearly better and equally safe.

"I opposed the proposed amendment principally because it practically gave to the legislature unlimited power over taxation. Prior to 1851 our legislature had broad powers and the shameful abuse that resulted is the real reason why the people of this state in that year adopted an amendment so worded that it prevents any discrimination.

"It is my observation that in almost every state wherein the legislature has the power to classify, it has unjustly discriminated against some type of property. In view of the radical times in which we now live, I am unwilling to permit the legislature to have power to classify unless the amendment guarantees us against unjust discrimination and favoritism. In my judgment the very object of a constitution is to confer authority in language that prevents its abuse.

"I cannot blind myself to the existence of many sincere persons who desire to use the power of taxation for the purpose of social reform, rather than to raise revenue. The proposal recently defeated would have biennially exposed the people of the state to fundamental changes in taxation, and I believe every two years there would have assembled at Columbus powerful lobbies to protect tax-dodgers and other lobbies composed of radicals more dangerous, because unselfish.

"I wish you to realize that I am not a standpatter; I am particularly anxious to see some change that will permit either the exemption of bank deposits, or their taxation at a low rate, but every movement is not progress, and before I start I always find out whither I am going.

"Persons out of the state have a misconception of the recent campaign. The fight was not between uniform rule and the theory of classification. The contest was between a system that protects everyone, and giving a blank check to the legislature. Those of us who are conservative were not willing to 'go it blind'."

No one can read this letter without being convinced of the absolute sincerity of the writer and his observations are well entitled to serious consideration.

It is difficult to see why, under the present laws, Ohio is not operating under a system to which the writer objects, which absolutely requires and enforces a most definite discrimination against tangible property, mainly real estate, or why, if the writer's wishes were observed, it would not mean writing into the constitution itself, instead of a statute as proposed, *some* sort of discrimination or at least a classification which would certainly not suit everyone. In other words, he believes in classification "with a string on it".

It would be interesting and very instructive to present in full the very illuminating and helpful letters that have been received. Lack of space prevents this and we must content ourselves with giving in separate paragraphs the various points made in answer to the inquiry, with some little running comment:—

Under present laws, the assessment of personal property has greatly increased in one county.—Another member, however, a county official, calls attention to the fact that probably 85 per cent of the personal property on the duplicates, is tangible personalty.

The Kentucky system (to which repeated reference is made in the replies and which was largely discussed during the campaign), would reduce the county duplicates. — The disturbing effect of drawing conclusions from a particular system in another state is thus illustrated. It seems to have had considerable effect. Doubtless the effects of the partial segregation adopted in Kentucky could not easily be explained.

As much tax-dodging exists in states which have classification as in those without it.—This is rather effective.

The classification campaign was led by stock-and-bond brokers and single-taxers. —This "unholy alliance" naturally did not serve to attract a large rural vote or the owners of city real estate.

The wording of the amendment was general and gave no idea of the kind of classification to be had. An amendment should fix the limits of classification.— This, as suggested above, is impossible. The result would be a *constitutional* classification, quite likely to be itself discriminatory.

Ohio has prospered greatly under the uniform rule of taxation.—Therefore, etc., etc., *post hoc ergo propter hoc.*

The abuses prior to 1851 led to the adoption of the uniform rule, therefore

only open the way to those same or to similar abuses.

Classification is desired by radicals and social reformers.

The present system protects everyone.—This seems to us so utterly contrary to the fact that we cannot fail to call particular attention to the claim. It protects nothing but exemptions.

The result was due to rural voters and fear of the single tax.

The result would be a situation where the landowners would pay all taxes.

The methods of the proponents were unwise and were not conciliatory. There was fear of legislative freedom. The farmer and the business man are too far apart. They could not unite towards a common interest.

The campaign was financed in part by bankers and was thought to be in their interest alone.

It was urged that the result would be simply an increase in the tax on real estate.

The almost total ignorance or disregard of the small amount of intangible property now taxed, the personal property now listed being almost entirely tangible personalty.

Ignorance of the effect of the uniform rule on real estate. — This appears to be illustrated in the letter copied above. The writer seems almost to ignore the existing discriminatory burden on real estate.

The objection was not to classification in general but to the form of this amendment.

The general unrest due to high prices and governmental expenditures led the people to oppose on the ground of individual protection against increases in expenditures. Classification was thought to be advocated as a means of getting more taxes.—Probably this is true. The question is, from whom shall the new taxes be taken?

The advocates of the amendment were over-confident, too sure of success. They failed to educate the voters on fundamental principles.

The opponents conducted a campaign of misrepresentation and appealed to class prejudice. They were well organized through the state Grange and presented a united front.

There was astounding apathy on the part of the thoughtful public.

The large number of ballots led to confusion, of which advantage was taken. The "Drys", for instance, ordered their cohorts to vote "no" on all short-form ballots, as these contained the amendments they were interested in defeating. It happened that the classification amendment was also on a short-form ballot.

The people were suspicious of the amendment, due to the uncertainty as to its legality.—One very competent observer insists that this was a vital cause of defeat.

The amendment as certified, differed slightly in form from that which appeared on the legislative journals. This difference suggested possible uncertainty as to the validity of existing exemptions of religious properties. The voters preferred "safety first".

Inertia and hesitancy to make changes, in the absence of an overwhelming present burden. Ignorance of existing conditions. Lack of correct information.

Misrepresentation by the opponents.

The Kentucky plan was referred to as relieving real estate when such was not the fact. — We are inclined to the view that this had a very great influence on the result. The Kentucky situation is not well understood and there is great discontent with it in Kentucky.

Class feeling was aroused by misrepresentation.

There was lack of team work among the advocates, Ignorance of the real meaning of classification. The opponents are said to have refused even to listen to the advocates. They were suspicious of them. Juggled statistics from other states were used. — The writer, a well-informed student of affairs, gives it as his view that it is utterly unwise to attempt to secure fair consideration of the matter in a political campaign.—Unfortunately, it is difficult to see how to avoid this.

These brief extracts from the replies, or statements of their substance, will perhaps leave the reader in confusion and doubt. They will, however, repay careful reflection and analysis by those who are seeking information as to how to conduct a campaign for classification.

We are, as above indicated, inclined to

think that the defeat was largely due to a failure to thoroughly understand the recent changes in the other states, particularly in the neighboring state of Kentucky, thus making it possible for references to certain specific results to be issued which, while true, did not present the entire picture in those states.

Another important cause appears to be the decided feeling of dissatisfaction with government in general, which has failed to function properly, as is quite natural under present conditions of upheaval and unrest. We think it probably true that the people hesitated to extend governmental powers in this situation. In other words, the time was most inopportune to propose a change.

We fail to appreciate the importance of the specifications of ignorance, inertia, prejudice and misrepresentation alluded to by the writers above quoted. It was not inertia but a definite purpose to avoid further fundamental changes in tax laws, under existing pressure from the federal government and that due to the friction in business and living conditions.

It is at least comforting to note the admission by opponents of *this* classification that the question was not really one of classification *in general*. And above all, the Oregon situation should be remembered and the many defeats there before final success. We refer the despondent Ohio friends to the encouraging description of the long fight in Oregon, written by optimist Galloway and published in the BULLETIN of February, 1918, p. 106.

THE KENTUCKY CLASSIFICATION PLAN—A CORRECTION

Our attention has been directed by an Ohio opponent of the classification amendment to a claimed misstatement made in the article by O. K. Shimansky which appeared in the October BULLETIN, as to the effect of classification in Kentucky.

The particular objection is to the implication that the "*farmers*" of Ohio did not "take into consideration the fact that the tax charge as a whole in Kentucky against real estate has been reduced under classification from 76 per cent to 57 per cent."

Our correspondent, with pleasing references to his assumption that this Association desires to publish only the truth, calls attention to the fact that the decrease applies only to the state tax on real estate which was reduced when the partial segregation was made in Kentucky and that the writer of the article in question failed to tell us that real estate was left, under that segregation scheme, to pay all local taxes, intangible property, machinery and raw materials being segregated and taxed only for state purposes.

We have not as yet heard what the writer of the article has to say; neither have we had reply to our letter of inquiry to the Kentucky officials. We have, however, a pamphlet prepared by Mr. Clarke, Secretary of the Kentucky Tax Reform Association, from which we quote the comparative revenue (we assume for all purposes) derived from the various classes, for the years 1917 and 1919, as follows:

	1917	*1919*
Lands and improvements	$2,154,321	$2,652,772
Lots and improvements	1,771,773	1,471,550
Live-stock	309,650	74,689
Tangible personalty	368,161	1,270,702
Intangible personalty	377,579	1,452,784
Bank deposits	62,024	209,363
Total	$5,073,508	$7,131,850

From the above it would appear that our correspondent's criticism is well founded, as the total taxes on real estate have actually increased under the system adopted.

It is perhaps appropriate to observe that the increased yield from tangible and intangible personalty and from bank deposits, secured presumably by reason of classification, may have prevented an even greater increase in the tax on real estate.

We are glad to make this brief reference to the matter and hope to receive more definite explanation from the writer of the article in question and from Kentucky sources, for publication in a later issue.

LEGISLATIVE AND NEWS NOTES

Miss Mary E. Elwood has resigned her position in the office of the state tax commissioner of **Connecticut** to accept an appointment as state bank examiner. This is the first instance of the employment of a woman to that office in the state.

Mr. Fred T. Field, having returned to Boston after service in Washington as a member of the Advisory Tax Board, has become a member of the firm of Goodwin, Procter, Field and Hoar, with office at 84 State Street.

We have received from Mr. W. R. Loyd, of Birmingham, information as to the personnel of the new state tax commission of **Alabama** which supersedes the state board of equalization. The chairman is John S. Mooring, who was chairman of the board of equalization from 1913 to 1915. The other members are A. A. Evans, also a member of the state board of equalization from 1911 to 1915. He is credited with the authorship of the income tax portions of the new revenue act. The third member is Thos. W. Sims, who was chairman of the preceding board of equalization and who will be remembered as a member of the executive committee of this Association.

Members will have doubtless received the reprint of the article by former vice-president of the Association Lawson Purdy on "The assessment of real estate". We were particularly pleased to secure this pamphlet for distribution because of Mr. Purdy's recognized authority as an expert on the matters covered. We have since received requests for copies to be distributed in the states of Tennessee and Ohio, where entire revaluations of the taxable property are to be undertaken.

An exhaustive and thorough revaluation of all property in the state of **North Carolina** is now in progress, under the direction of the state tax commission.

At the annual convention of the Mining Congress, held in St. Louis, November 17-22, one session was devoted to the taxation of mines. Among others, there were addresses by Mr. R. C. Allen, of Cleveland, Ohio, A. P. Ramstedt of Wallace, Idaho, and George E. Holmes of New York City, members of this Association.

Considerable progress has been made by the committee on the taxation of mines appointed by President Haugen. Ex-President S. T. Howe, Messrs. C. M. Zander of Arizona, and R. C. Allen of Ohio met at St. Louis at the time of the annual convention of the American Mining Congress, for preliminary discussion and for planning the work of the committee. The other members, so far as they have been appointed, are Professor E. L. Bogart of the University of Illinois and Mr. J. Parke Channing of New York City. We anticipate very substantial results from the work of this committee.

We record with regret the approaching retirement from the state tax commission of **New York** of Chairman Walter H. Knapp, who contemplates a change due to the inevitable consequences of political tenure of office. Judge Knapp, in kindly compliance with our request for cooperation towards the development of a tax commission department for the BULLETIN, sends us notes of changes which will probably be recommended by the commission in its forthcoming annual report, as follows:

Provision for making clear the exemption of intangible personal property from taxation, in view of the operation of the income tax, both as to individuals and foreign and domestic corporations.

Repealing the article of the tax law providing for a tax upon securities at a low rate and of the penalty section in the inheritance tax law, providing an additional inheritance tax upon securities upon which an investment tax has not been paid during the life of the owner. The income tax is thought to cover the entire subject of taxation of intangible property.

Provision for amending both the personal income tax law and the business cor-

poration franchise tax law, so as to provide for the distribution of some portion of both taxes to the school districts of the state. Under the school district unit which exists in the state, the exemption of this property has caused serious complaint in some districts.

Repeal of the special franchise tax law and the substitution therefor of a classified gross earnings tax or some other simplified form of taxation together with the assessment by local officers of the tangible real estate located in the local units. This proposition is not surprising in view of the great amount of uncertainty and litigation which has followed the attempt to administer the special franchise tax law, applicable to public utility corporations.

Judge Knapp mentions with pardonable pride the unanimous affirmance by the appellate court of the determination of the tax commission on a very important matter affecting the equalization of assessments in the large and important county of Westchester. The constitutionality of the act giving jurisdiction to the state tax commission to interfere in county equalization matters was raised. The result is of considerable importance in the development of proper assessment methods in the state.

Note is also made of one instance of the indirect effect of the personal income tax law. This law distributes 50 per cent of the yield to the various local units in proportion to the assessed valuation of the real estate therein. The stimulus to increase the assessments in order to secure a larger slice of the income tax, has turned out to be effective in the city of Middletown, where assessments have been more than doubled, and this result has been approved by the voters as indicated by the re-election of their mayor and assessor under whom the increases were made.

All of the above, coming from Judge Knapp in the closing days of his administration, leaves us with a distinct feeling of regret that the state should be deprived of his services just at a time when the effect of two terms of devoted service was beginning to show itself in tangible results.

The work of the **Michigan** board has always been interesting and instructive. The following comment upon its recent activities furnished by Secretary Burtless will therefore be of value to those from the other states who look to Michigan for help in the difficult problem of securing a just equalization of values throughout their states.

"Equalization of values between the several counties in the state has been the item of greatest interest among taxing officials of the state this year. For a number of years the state board of equalization consisted of the auditor general, secretary of state, state treasurer, superintendent of public instruction and the chairman of the board of state tax commissioners. Under the law the board was required to meet and equalize the state twice in each five-year period and the tax commission was required to furnish the board an estimate of the true cash value of each county. While the estimate required has been very carefully made prior to each meeting of the board, it has never been accepted as the basis for equalization. The legislature of 1919 amended the law so that the board now consists of the auditor general, state commissioner of animal industry, and the three members of the board of state tax commissioners. The estimates prepared by the tax commission were published in advance of the meeting of the state board of equalization and were the basis of all discussions. After a full hearing, and expressions of satisfaction with the estimates from representatives of nearly every county, they were finally adopted, with slight changes, as the basis for the equalization.

"As a result of the equalization, all but thirteen of the eighty-three counties of the state will pay a smaller proportion of the state tax than under former equalizations—the thirteen counties being the industrial centers which have been to a great extent under-assessed. It is the firm conviction of the tax commission that the present equalization will result in the fairest distribution of the state tax in the history of the state. Under the amended law the equalization must now be made annually instead of twice in five years.

"The gathering of data upon which to base the estimates occupied the entire attention of the members of the board and their entire field force until August first. Since that time the review of local assessments has been the principal activity of the department and by December first ten counties will have been completely reassessed, and all property placed upon the

assessment rolls at true cash value as required by the constitution and laws of the state. In some cases individual assessments have been increased several hundred per cent, and in one county the average increase was approximately two hundred per cent. With the close of this year's work upwards of ninety per cent of the entire state will have been reassessed by the board since 1912, when the work of reassessing the state was begun."

There has been a recent revival of requests for the extremely useful pamphlet issued by this board in 1913, which will be remembered under the title "Cash value assessments".

We have not heretofore noted the legislation enacted at the special session of the **Montana** legislature, which adjourned in August. Much of this was of considerable importance.

An act was passed providing for the taxation of the property of freight-line companies based upon the gross earnings derived from both intrastate and interstate business, at the rate of 5 per cent.

The inheritance tax law was amended with reference to the inheritance tax on intangible property of non-resident decedents.

Provision was made for an increase in the salaries of the county assessors, the amounts ranging from $1500 to $3500 per annum.

An act was passed providing for the establishment of a fund to aid those destitute because of losses resulting from drought, hail or unfavorable climatic conditions, and providing for a levy of taxes in that connection.

An act was passed providing for the submission to the electors of an amendment to the constitution to create a board of examiners and a board of administration looking to the general establishment of reforms in administrative methods in the state, including budget reform.

A PRACTICAL CONSTRUCTION FOR A WORKABLE INCOME TAX

ALLEN RIPLEY FOOTE

Net income is the most logical subject of taxation. The taxation of income, from whatever source derived, should take the exacted tax from the corn-crib instead of taking it out of the seed corn. The difference in effect upon production between these two exactions must be patent to the most uncritical observer.

Net income is a concrete fact capable of exact demonstration by any intelligent tax assessor working under the provisions of a properly constructed income tax law.

When the amount of net income subject to a tax has been determined, the assessment and collection of the tax to be paid to any taxing government can be easily and accurately accomplished.

The theory that no subject of taxation should be taxed by more than one taxing body is sound as an administrative and economic proposition; but under our complex system of federal, state, county and local governments, it is unworkable. The desired degree in efficient administration can be developed, however, by the adoption of a rule providing that but one tax return shall be required for the taxation of any subject.

The securing of correct income tax returns on which to base an assessment for the payment of the tax required is difficult for the government and annoying for the taxpayer. It is obvious that when revenue from the taxation of net income is sought by several taxing authorities there should be uniformity in the requirements to which the taxpayer must respond. This uniformity can be established only when the government having the broadest jurisdiction and exercising the greatest power undertakes the work of framing the instructions and securing the returns. It is clear that instructions satisfactory to the federal government will be equally so to each of the several states. It is equally true that every taxpayer would much rather have that return used as a basis for the assessment of a state income tax than to make a separate return for the state under different instructions.

By using the income tax returns collected by the federal government as a basis for the levy of a state income tax an enormous saving in the cost of assessing and collecting this tax will be effected by each state, even though they be required to pay the federal government for the privilege, and every income taxpayer will be saved from the loss of time, expense and nerve-racking annoyance involved in being required to fill out separate income tax returns under differing instructions from the federal government and from each of the several states in which he has investments.

The logical result to be developed from the use of an identical tax return by the federal and state governments will be to establish a uniform tax rate on each class of taxable incomes. This will protect a taxpayer in one place from being taxed at a higher rate on an identical return than is paid by taxpayers in other states. It will remove all reason on the part of a taxpayer for shifting his residence from one state to another to escape the burden of taxation. It will lead to the fixing of rates the total of which will be just to the subject taxed. It will lead the federal and state governments to adopt governmental policies designed to encourage the earning of net incomes as a means of promoting prosperity and providing a reliable source of revenue through placing the largest possible number of its citizens upon its income tax pay-roll.

Every income taxpayer can be relied upon to protect the ownership of private property and the government of law established by our system of legislation by representatives elected by the people.

To institute this system, the income tax laws of the federal government and of the several states will have to be revised. This will have to be done in any event if a well-devised and efficient system of income taxation is ever to displace the existing chaos.

DISTRIBUTION OF INCOME TAXES TO LOCALITIES

A VAGARY OF THE WISCONSIN INCOME TAX LAW

T. E. LYONS

Within the last week my attention has been called to a news item going the rounds of the press stating that the little village of Biron in Wood County, Wisconsin, is overwhelmed by such a flood of revenue from income taxes that it does not know what to do with the money, and that for self-protection the village authorities have decided "to erect a community hall equipped with a gymnasium, bowling alleys, pool and billiard rooms and a large auditorium."

The financial condition in Biron, like the report of the death of Mark Twain, is greatly exaggerated. The amount of income tax for the current year is only $13,023. Moreover, the village authorities have graduated the property tax levy from year to year according to the amount of revenue available from the income tax, as shown in the following table, which also contains statistics of two other towns:

TABLE SHOWING INCOME AND PROPERTY TAX LEVIES

District	1914		1916		1918	
	Property Tax Levy	Income Tax Levy	Property Tax Levy	Income Tax Levy	Property Tax Levy	Income Tax Levy
Village of Biron	$14,914	$2,152	$9,803	$2,5 8	$8,954	$22,132
Town of Kronenwetter	12,093	1,763	20,710	4,167	26,036	54,487
Town of Barksdale	10,010	9,906	18,418	118,410	34,490	117,636

It will be observed that in 1914 the village levied approximately $15,000 property tax, and received that year $2,152 from income taxes. In 1916 the property tax levy was reduced to $9,803 and the receipts from income taxes were only $2,558, making a total tax levy of $12,361 or more than $4,000 less than the year 1914. Presumably, this was due to a balance carried over from the preceding year. In 1918 the property tax levy was less than $9,000 and the income tax amounted to $22,132, making a total tax revenue of $31,086.

Biron is a very small village with a population of about 250 souls, centered about the Consolidated Water Power and Paper Company plant. It has a property value of about $750,000 and, under normal conditions would have a tax rate of between 15 and 20 mills, and a revenue of about $15,000. As the village is new and the population partly transient, a tax levy of $20,000 would not be extreme, but revenue beyond that amount is of doubtful advantage. There is a substantial balance in the treasury, however, and the situation is not as embarrassing as the report would indicate.

The town of Kronenwetter in the adjoining county of Marathon presents a similar, but somewhat more aggravated situation. This is an ordinary rural town, only partially improved, bordering on the Wisconsin river with a population of about 600 and nothing to distinguish it from its neighboring towns except the location of the Wausau Sulphite Fibre plant. It has a property value of between $2,500,000 and $3,000,000, and as the average tax rate for rural towns in Wisconsin is about ten mills on the dollar, should normally have a tax revenue of from $25,000 to $30,000. In 1914 this town levied a property tax of $12,093 and received $1,763 in income taxes, or $13,856 altogether. In 1916 the property tax levy was $20,710 and the income tax $4,167, making a total revenue of $24,877. In 1918 the property tax levy was $26,036 and the income tax $54,487, or $80,523 in all. It will be observed that in this case the levy on property was not graduated according to the amount of revenue derived from the income taxes, but was materially increased from year to year. Undoubtedly, the presence of the sulphite plant occasioned additional expenditure, but not to the extent indicated by this sharp increase in revenue.

A more aggravated situation still is to be found in the town of Barksdale, Bayfield County, where a branch of the Dupont Powder Company is located. This town, during the years in question, had a permanent population of about 350 and a property value of about $3,500,000 including the Powder Company plant. According to the average tax rate for rural towns, receipts from taxes in the town of Barksdale would be from $35,000 to $40,000. In 1914 the aggregate receipts from taxes was less than $20,000, consisting of a property levy and an income tax levy of nearly $10,000 each. In 1916 the property tax levy increased to $18,500 and the income tax levy to $118,000, or $136,500 in all. In 1918 the property tax was again increased to $34,500 and the income tax to $117,636, or $152,136 in all. Here again, the presence of the powder plant and the multitude of workmen employed there, called for more than ordinary expenditure. But nothing short of sheer wastefulness would necessitate a revenue of $150,000.

As a matter of fact, the town of Barksdale did not receive that amount. In the first place, the amount of income tax shown above was reduced by the offset of personal property taxes, and in the second place, the income tax statute was amended by providing that "when the amount of income tax payable to any town, city or village for any year shall exceed 2% of the equalized value of property therein, the excess of such income tax shall be paid to the county treasurer and by him distributed among the several towns, cities and villages of the county according to school population." The excess over the two percent was, therefore, expended for school purposes. This still left the town of Barksdale a revenue of over $70,000 from income taxes and nearly $35,000 from the property taxes, an amount quite in excess of its legitimate needs.

Of course, the large income tax for the years 1916 and 1918 was primarily due to war conditions and may not again occur. Heavy income taxes in small districts of this character result from the location of important industries within their borders. The income of the business is drawn from state-wide if not from country-wide sources and the revenue derived therefrom may well be spread over a broader area. The local community contributes little to the income of such an institution and is fairly

compensated for the increased expenditure entailed by the tax on its physical property.

The Wisconsin law provides that 70% of all taxes on income derived from property located or business transacted in a given locality shall be paid to the local municipal district, 20% to the county in which this district is located and only 10% to the state. The income from any given manufacturing business from year to year is naturally irregular and the allocation of the income to a given locality presents many difficulties. These difficulties are largely overcome if not eliminated when the entire tax is paid into the state treasury as under the North Dakota and Connecticut income tax laws. The New York law provides for the payment of one-half the net receipts from income taxes to the state treasury and distributes the balance not according to the source of the income but according to the equalized value of property in the several districts. The Massachusetts law provides for the distribution of the income tax after the first year as the general court may determine, but I am not advised as to the basis of distribution adopted. While the Wisconsin rule may be logical in theory, it presents great difficulties in administration and occasionally produces results leading to wastefulness and extravagance. An amendment of the law in this respect is desirable.

The appropriation of a larger part of the net proceeds of the tax to the state or a limitation of the amount payable to local districts to a fixed percentage (say 1%) of the assessed valuation, would seem to afford a simple and effective remedy.

SINGLE TAX IN THEORY AND IN PRACTICE

J. HAMILTON FERNS
Chairman, Board of Assessors, Montreal

If there are any here to-day who were in business in the 70's of the last century they will remember, and perhaps from sad personal experience, the disastrous financial storms which were sweeping over this country and that of the neighboring republic. Many banks suspended payments, and a number passed out of existence. Old established and highly-rated financial, commercial and industrial institutions, unable to finance their obligations, were compelled to assign, and the official assignee flourished in this city as never before nor since.

The wheels of industry being stopped, thousands of all classes found themselves without employment or the means of procuring the necessaries of life. Poverty, with all its evil effects, was to be found on every hand, and, to alleviate the destitution, soup-kitchens were established in all the large centers of population. The panic which began in 1873 so affected the real estate market that one after another of the 200 real-estate brokers in the mid-section of New York City put up their shutters and turned to other occupations to make a living, and in 1878 only one of those brokers still remained in business. He tells us that he saw millionaire customers reduced to poverty over night, and compelled to turn to menial labor to support themselves and families.

When all classes of society were suffering from the effects of those bad times there appeared in 1879 a book, written by Henry George, entitled "Progress and Poverty," in which he painted in glowing colors the contentment, happiness and prosperity which would come to all classes by the adoption of a system of single land tax, to replace the systems of taxation which were, in his opinion, the cause of all the poverty, and disturbed financial and social conditions then to be found in every land.

It is not surprising to find that at a time of such general depression the appearance of this book caused many to turn to Henry George as a modern Moses, who would lead them out from the bondage of a supposed unjust system of taxation into the freedom of a world-wide system of single land tax, under which financial crises, class distinction, poverty and misery would be unknown, and peace, prosperity and brotherly love would reign under the fairy wand of a single tax.

A beautiful vision! And yet forty years

[illegible] and we find the followers of Henry George still wandering in the wilderness of speculation, and many are now commencing to realize that the Promised Land which they thought they saw in the distance was but a mirage.

While it is only justice to say that there is much to admire in the honest purpose of Henry George; while we are all in hearty sympathy with him in his endeavor to improve the social and economic conditions of the masses; while we are often hypnotized by his brilliant rhetoric and plausible theories, yet when we coolly and impartially analyze his writings we are forced to the conclusion that he is dealing in theories which are not based on experience, and are not supported by figures and facts.

Many, if not the majority, of those who call themselves single-taxers, have never read any of the writings of Henry George, except, it may be, an extract quoted by some correspondent in a newspaper. Such people are prone to indulge in "mouth-filling phrases," and overlook the fact "that not only is taxation a more complicated matter than is imagined by the ordinary tyro, but that the adjustment of taxation has always tested the energies of the greatest statesmen the world over."

Many speak of the single tax as if Henry George was the originator. He only revived theories advanced during the preceding 200 years by the Physiocrats of France in the 17th century; Thomas Spence, an obscure Newcastle schoolmaster in 1775, and Rousseau, at the end of the 18th century.

With my limitation of time I cannot even touch upon the chief causes of poverty, which are deep-seated in the nature of man rather than of legislation, nor can I dwell upon the principles of taxation as laid down by the most eminent political economists of the past two centuries, further than to say that the taxation systems of all civilized nations are now founded on the principles as laid down by Adam Smith, "that the subjects of every state ought to contribute towards the support of government as nearly as possible in proportion to their respective abilities, that is to say, in proportion to the revenue which they respectively enjoy under the protection of the state. This revenue comes from three sources: rent, profits, wages, and every tax which falls upon one of these is necessarily unequal in so far as it does not affect the other two."

Now, the theory of Henry George is that single tax on land values should replace all other taxes and provide all the revenue necessary to meet the requirements of local, provincial and federal governments. Such a tax, according to his theory, would abolish land speculation, encourage unlimited building, lower rents, increase wages, give permanent employment to all, and forever abolish poverty, with all its evil results. This tax was not to fall on all land, but only on land value. Notice the distinction. If a shiftless, improvident farmer had no return from his farm above a fair return on his labor and capital, he would not have any tax to pay. His neighbor, however, whose farm, as a result of his thrift, energy, industry and progressiveness, would yield a revenue in excess of a mere revenue on labor and capital, would have to pay a tax on his land value. As the community must have a stated revenue to meet the cost incurred in municipal services, the result would be that the hard-working, progressive farmer would not only be paying his own share of the municipal expenses, but would have to assume a portion of the share of his shiftless neighbor. This is not my statement. In the *Century Magazine,* July, 1890, Mr. George, in his reply to the late Edward Atkinson, the eminent economist of Boston, wrote these words: "If there is a proportion of farm lands which yield no return above the ordinary return to labor and capital, then in such cases there is no real land value, and under the single tax such farm would pay no tax at all." I leave you to draw your own conclusions from such a proposition. In the same article he says, "We (the United States) have no more need for an army and navy, and coast defences than Mr. Atkinson and I have for suits of armor and blunderbusses." He built his theory on the presumption of a world-wide permanent peace, but had he lived for twenty-five years he would have seen his statement that the United States did not need an army and navy and coast defences blown to pieces, and taxes levied to equip, transport to the battlefields of France, and maintain an American army of nearly four million men which could not have been financed just and equably by any single tax on land.

So much briefly for the theory, and now let us turn and see what has been accomplished by the single tax in practice.

For some years the single-taxer referred us to Western Canada and a few places in the United States as shining examples of the prosperity resulting from the application of the single tax in those places. At present they try to draw our attention away from the conditions now existing in Western Canada and refer us to Australia and New Zealand. Time will not permit me to go into the facts in connection with these two countries further than to say that the unimproved land tax in Australia and New Zealand is only one part of their system of taxation. In New Zealand only 43 boroughs out of 113 have adopted the unimproved land tax, which is far from being generally satisfactory. In Australia the Town Clerk of Brisbane City said, "that he did not consider it would be desirable to revert to annual rental values as a basis for valuation," while on the other hand the Town Clerk to the Borough of Brisbane stated, "that he considered the old mode of rating on improved values to be fairer than the new, and that he did not think rate-payers held any sentimental objections to the rating of improvements." Australia is now widening her base of taxation to meet increasing expenditures so that the single-taxer can find no consolation in viewing the taxation system there.

Reference is often made by single-taxers to the success of their system in Houston, Texas.

I have a letter from an official of the City of Houston, dated February 18th, 1919, in which he says, "the Single Tax system is not in operation in the city of Houston, and never has been. However, the late Mr. Pastoriza, Tax and Land Commissioner, during the years 1912, 1913 and 1914, inaugurated a system commonly known as the 'Houston Plan of Taxation,' under which Houston assessed all land for taxation at 75 per cent of its value, and improvements at about 25 per cent. This was abolished in 1915 as being unconstitutional."

In the State of Oregon in 1916, a single-tax proposition was submitted to the vote of the people. This proposition, as described by a local single-tax advocate in a freely quoted paragraph, "has as its intent, to confiscate all land titles, leaving owners and mortgagees nothing but improvements and preferred rights to become tenants of the state." The resulting vote was 43,800 for, and 184,900 against, nearly five to one; the electorate decisively showing that they were not to be caught by any such socialistic theories, and were opposed to the confiscation of land in any form.

In the State of California in 1912, 1914 and 1916, the electorate voted on a single-tax referendum with a majority against it in 1912, of 74,638; in 1914, 108,106, and in 1916, of 316,201. This amendment voted on was "that State, County, Municipal and District taxes shall be raised by taxation of land values exclusive of improvements, and no tax shall be imposed on any labor, product, business or person."

This proposition was described by the San Francisco *Chronicle* as "shockingly wicked and absurd," and when it was so overwhelmingly rejected in 1916, the *Chronicle* in an editorial said: "While California probably outranks even Kansas as a cranky and uncertain state, the overwhelming vote by which the single-tax humbug is snowed under proves that the mass of the people, at any rate, are not utterly clean gone daft. There is somewhere a boundary line beyond which reason holds sway and the single-tax humbug is far outside of."

Coming nearer home we find that the missionary work done by single-taxers in Western Canada bore fruit, when in 1909 a disciple of Henry George was elected Mayor of Vancouver, practically on his promise that he would carry into effect the principles enunciated in Henry George's "Progress and Poverty." Subsequent to his election the tax was taken off all improvements, and Vancouver prospering, as all other cities on this continent were prospering at the time, the boast was made that her prosperity was due to her system of taxation. The supposed triumph of the single tax was such that the son of Henry George was taken to Vancouver by some enthusiastic single-taxers to see the glorious results arising from the putting into practice of the theories of his father. While he was then entertained most royally, I do not think the same reception would be accorded to-day.

Following Vancouver, the exemption of improvements became practically the law of British Columbia, Alberta and Saskatch-

When land values were soaring, fortunes being made daily in land speculations, and general prosperity reigning throughout the west, the single-tax journals and supporters were boasting far and wide of the success of the theories of Henry George in Western Canada.

In April, 1914, a body of citizens was appointed by Mayor Mitchell and the Board of Estimate and Apportionment of the City of New York to study the systems of taxation in the cities of the United States and abroad, so as to see if any improvements could "be suggested as calculated to effect an improvement in the ways and means of creating a revenue for payment of the cost of the city government."

This committee, which was composed of some of the ablest taxation experts of that city, had as chairman of the Executive Committee, Professor Seligman, one of the most eminent political economists of the present age. One of the first things this committee did was to appoint Prof. Robert Haig, Instructor in Economics in Columbia University, with the responsible duty of making a thorough study and exhaustive report on the so-called single tax in any American cities where the plan had been tried, but particularly in Western Canada, where it was stated that the single-tax system was the cause of unparalleled prosperity and satisfaction. Professor Haig spent about three months personally visiting the cities of our Canadian West. In this time he not only studied the conditions through municipal officials, but interviewed all classes from the members of the legislatures down to the working man, and in his valuable report of nearly three hundred pages he impartially records the replies to his enquiries, and the opinions expressed for and against the exemption of improvements, and gives valuable statistics to show the condition of things as he then found them. His conclusions were, "the system of taxation does not check or prevent speculation in land, the absence of a tax on buildings is not in itself an insurance that building activity will continue indefinitely, as witness the slump in all Western cities, except Winnipeg, in 1913 and 1914." And, "it has been customary to think of Western Canada as a region where single-tax measures have been uniformly successful. Such is not the case."

While prosperity was general throughout Western Canada, few if any of the municipalities gave much thought to their system of taxation, so long as there was sufficient revenue to meet civic requirements, but when that prosperity began to wane in 1912 taxation became a burning question. As it was found that depreciation of land values was imperilling the solvency of many municipalities, and would probably cause some of them to fall down on their bond indebtedness, many schemes were tried to bolster up the tottering land tax system, the chief of which was over-valuation. Proprietors had practically no redress against over-assessment. Section 371 of the Town Act of Saskatchewan says, "that in case the value at which any specified land has been assessed appears to be more or less than its true value, the amount of assessment shall nevertheless not be varied on appeal if the value at which it is assessed bears a fair and just proportion to the value at which the lands in the immediate vicinity of the land in question are assessed." In other words: even if lands were assessed at two or three times their value, such assessment must stand if all neighboring land was assessed alike. Comment on such an iniquitous invitation to over-assessment to bolster up a system of single land tax is unnecessary.

The system of single land tax having passed through a period of prosperity, has now passed through a time of depression, and, as was predicted by all economists of any standing, what seemed a success during prosperity has proved a lamentable failure in time of adversity. The real-estate men, "by whose propaganda the tax was taken off improvements, and who boosted sales on the benefit of exemption from taxation of improvements, are now the most bitter in opposition to the single land tax, as they are caught with large blocks of non-revenue-producing land, for which they paid big prices, but which they cannot sell at any price, and upon which they have to pay heavy taxes. They are now in the forefront of those who would reimpose taxes on improvements."

Land values declining in Vancouver in 1912, the aldermen of that city found themselves in a financial dilemma. It would never do for those in authority to admit the failure of a system which had been their boast and pride, so they increased the tax rate until in 1917 it was 24 mills,

this rate, of course, bearing heaviest on the small proprietor. In 1918 the Council was faced with the alternative of an increase of 3½ mills or abandonment of the unimproved land tax. It was abandoned, and one of the newspapers of that city said in its next issue: "In point of fact the Vancouver City Council is out to broaden the basis of taxation, and get as far from the single tax as it possibly can."

This change of policy on the part of Vancouver has since been followed by practically all the municipalities in the West, some voluntarily, some otherwise.

Early last year South Vancouver defaulted in meeting its obligations, and the Provincial Government appointed an administrator to manage its affairs. The Edmonton *Bulletin*, in referring to the matter, said that among recommendations made by him to the taxpayers asking them to help him to pull the municipality out of the fire, was one which might be of interest to the citizens of Edmonton, where the system of taxing land only was tried to a finish and found insufficient. The administrator said: "After careful consideration of the financial situation, I find it absolutely necessary to depart from the straight tax on land, drastic though it be."

C. J. Yorath, City Commissioner of Saskatoon, made a special report in 1917 upon Assessments and Taxation to the mayor and aldermen of that city. It was a scathing indictment of the policy of exempting improvements from taxation, and he stated "that it had proven to be the most difficult method of raising revenue, was largely responsible for enormous arrears of taxes, did not prevent speculation in land, but in fact stimulated speculation, as through the supposed advantage of inducing the owner to develop his property, an unhealthy prosperity was created."

A single-taxer writing to the *Gazette* in the latter part of 1917, said that "Edmonton had also adopted an honest and wise tax system, and it is highly improbable that the residents will be fooled by the speculators into any change whereby resident proprietors will carry the burden of speculators and non-residents, and that its utilities, municipally operated, had proved a success."

A speaker in this city in 1916, referring to Edmonton, said, "that wherever the site-value system had been tested it has been attended by beneficial results; it has never been discarded where once applied, and as the matter becomes better understood the advocates of the system increase in vast numbers." What are the facts? In a letter from a city official of Edmonton, March, 1918, he says: "No changes in our system of assessment have been introduced during the past two years. Very radical changes are, however, contemplated for this year. Three of our utilities have returned substantial surpluses during the past two years, but the street railway has had a deficit which more than wiped out the surplus from the other utilities." The municipality-operated utilities are: Electric Light and Power, Telephone, Water Works and Street Railway, the deficit in 1916 being $20,827 and in 1917, $25,540. Since that letter was received the so-called single-tax system has been abandoned and Edmonton now taxes everything in sight. It was only a short time ago that a single-taxer in addressing one of the associations of this city said that, "the people in Edmonton, Vancouver and Saskatoon were well satisfied with the result of their land tax system, despite the criticism appearing in some newspapers." That they were not satisfied is shown by their return to saner methods of taxation and the abandonment of the single land tax.

As an evidence of the inflations of land values so as to obtain sufficient revenue on a low tax rate, Edmonton is a most conspicuous example. In 1914, with a population of 72,500, the assessed land value of that city was $209,000,000. Montreal's total assessed land value in the same year was $537,000,000. Had Montreal's land value been assessed at the same ratio to population as Edmonton's, the assessed value would have been $1,874,000,000, or $1,023,000,000 more than the total assessed value of Montreal's land and buildings. In other words, the assessed land value per capita was in 1914, Montreal, $825, and Edmonton, $2,880, or over three to one. These figures show how the single-taxers of the West were bolstering their theories by fictitious values and a low tax rate.

Throughout the whole of the West the history of the single land tax has been the same. It did not prevent or even check land speculation. On the contrary, the bait of exemption of improvements stimulated speculation. There was, in some

places, a temporary increase in building, which was prejudicial rather than otherwise to the welfare of the community. Assessment Commissioner Painter, of Vancouver, reported early in 1914, "that less than half the houses which are ordinarily rented, now have tenants." The Credit Foncier office building in that city was then vacant except for the top and ground floors; and Professor Haig reported: "There seems to be no doubt that Vancouver is over-built."

As a benefit to the working man it has utterly failed. The City Treasurer of Victoria, B. C., says: "With total exemption of all buildings from taxation, I think the working man is getting the worst end of the stick." This is the consensus of opinion of all who have carefully and impartially studied the conditions in the West.

To sum up: the single-tax theory, when put into practice, has failed to abolish or in any way check land speculation; it has not lowered rents; it has not been instrumental in giving permanent employment to all willing to work; it has not increased wages; it has not lowered the cost of living; nor has it abolished poverty. Like many other plausible theories, "it has been weighed in the balances and found wanting."

THE MENACE OF TAX-EXEMPTION

THE LATEST AND MOST POWERFUL WEAPON OF THE SOCIALIST AND SINGLE-TAXER

KINGMAN NOTT ROBINS

An address delivered at the annual conference of the American Bankers Association

Tax-exemption is as old as our systems of taxation, but it is only within the last three or four years that the policy of tax-exemption has become so great a menace to our institutions and our business fabric. We see that tax-exemption as we have it today is not an academic problem in economics, but a practical matter of great and vital concern to everyone of us when we realize that it threatens:

1. The very existence of the best features of our taxation system, particularly the income tax; and
2. To give government agencies such an advantage over private business in borrowing funds that this advantage alone is enough to make a government monopoly of the government instrumentality thus subsidized.

Only the single-taxer and the state socialist will face such an outcome without concern. All others, when they realize the facts, must join the ranks of those who are opposing all measures to continue and extend these exemptions.

Government Monopoly of Banking

As bankers we have particular reason to bestir ourselves, for the reason that the menace of this tax-exemption "craze" most directly concerns banking. Absorption of the banking functions of the country by the government is, in the history of state socialism, the most important first step in the general socialization of business, for with the control of the purse-strings goes that other control which the state socialist seeks. There is no more subtle and withal simple means of putting private enterprise in banking out of business than to create a government banking instrumentality and give it the special privilege of freedom from all taxes. If the banker will figure out how much his bank would save if it were free from all taxes of any character, he will quickly see the force of this assertion. Tax-exemption alone is enough to put the government institution in such a favored position that it can eventually monopolize the field, even if less efficiently managed than its private competitors.

The first encroachment of government on this basis of special privilege and subsidy in competition with private enterprise was in the field of farm mortgage banking, through the creation of the federal Farm Loan banks. Their success in disposing of

their bonds to the public at an interest rate about 1% below the going average rate on taxable mortgages, is admittedly owing to the tax-exempt feature, but it is enough to give the government agencies a monopoly of the field unless they are managed with hopeless inefficiency.

It is now proposed, in bills pending in Congress, to extend these subsidized government agencies into the field of city mortgage banking, personal credit banking, and export trade banking. The proposed Federal Home Loan banks, Personal Credit banks, and banks for financing the export business, would potentially occupy, with the existing Farm Loan banks, practically every banking field on a tax-exempt basis. Monopolization by these government agencies of the banking business of the country may not be the aim of the sponsors of these measures, but it is certainly a logical possibility, and the least that may be said is that these measures provide for a vast scheme of unfair competition for the present banking interests of the country.

There is space here only to suggest the dangers of this movement to the banking business. The other dangers, no less alarming, can also only be mentioned briefly.

Nullification of the Income Tax

The nullification of the income tax is one of the most serious results of exempting securities from taxation, how serious we may judge from the fact that securities already outstanding or authorized, which are fully or partially tax-exempt, aggregate nearly 30 billions, or 40% of the total national wealth, apart from real estate, in 1912. At the rate we are going in the creation of new non-taxable issues, how long will it be before the proportion of non-taxable personalty will not be 40%, but 50%, 60% and more, and the income tax on individuals rendered ineffective, except as derived from salaries and like earnings? After years of agitation to relieve real estate of a burden of taxation that was rapidly becoming unbearable, especially in the large centers, and after years of aggravation and inequity in the administration of a personal property tax of the old type, we have come to the income tax as the most equitable and fair and effective means of taxing in accordance with the "ability to pay." We already have a federal income tax and income taxes in several of the states. Tomorrow we shall undoubtedly have them in the cities. They are the obvious solution of our problem of carrying our growing burden of taxation, for all the evidence points to permanently higher levels of public expenditure and taxes than before the war. The debt of the United States has grown 25 billions in six years, making the annual interest burden alone equal to the total revenue of the government in the last pre-war year, and equal to 20% of the estimated annual increase in national wealth. This interest burden *plus* the amortization of the debt, *plus* the rapidly growing public expenditures in connection with both new and old functions of government, forbid any material reduction in the rates of the federal income tax. As for local taxation—state, county and city — the increase in revenue from taxation must be rapid to keep pace with a rate of growth in expenditure that is even greater now than in the decade 1902-1913, when the increase was 113.2% as compared with a growth in national wealth for the same decade, of only 75%.

It would be financial suicide to destroy the income tax revenue from securities, and put all the burden on service incomes and realty, in the face of such a situation, and yet that is exactly what we shall be doing if we do not at once remove all the tax-exempt features of future issues of securities. There may be a constitutional question involved in the question of making taxable the issues of municipal and state governments, but no such question affects the issues of the federal government and its agencies. Canada saw her mistake in making her Victory Loan tax-exempt, and her new loan is taxable. Ohio has seen the light, and made her municipal obligations taxable within her borders. How long will it take the other states and the federal government to apply common sense and simple arithmetic to their financial policies, and to realize that the making of any securities tax-exempt robs them of far more revenue than can possibly be saved to them or their beneficiaries by exemption? The truth of this is well illustrated by Congressman McFadden of Pennsylvania, in his speech of June 16th last, when, in speaking of the operations of the federal Farm Loan banks, he said:

"We will take the case of a farmer, an Iowa farmer, for in that state the average beneficiary of this government charity, owns property worth at least $15,000. This farmer has a loan at 6 per cent from some private institution. He replaces it by a loan from the federal farm-loan bank of 5½ per cent. He saves $5. The $1,000 that the farmer receives represents a bond bought by a millionaire investor. Being tax free, the entire $50 interest that the millionaire investor receives on this bond he puts in his pocket instead of giving $33.50 of it to the government, as he would if it came from other security. In local taxes this $1,000 bond escapes at least $5 additional taxes. Here is the net result of this government owned and operated bank scheme as at present run:

On a $1,000 loan.

Farmer saves	$5.00
Multimillionaire makes	38.50
Federal government loses income tax	33.50
Local government loses various taxes	5.00
American people pay	38.50
To give farmer	5.00
Costs American people	7.70
To give farmer	1.00

(These computations were made when the revenue law of 1917 was in effect. Under the law of 1919 the cost would be greater.—W. E. H.)

"Never in the history of government has there been such an obnoxious and vicious example of taxing all the people for the benefit of the rich. Never has there been such a vicious and unjustifiable example of class legislation. If these farmers, owning, on an average, property worth more than $5,000, must be the objects of government charity, then it would cost about one-eighth of the present plan to give them the money direct."

Mr. McFadden's calculation was based on the maximum surtaxes of the 1917 law. Experience shows the justification for using these maximum calculations in the fact that these tax-exempt securities tend to concentrate in the hands of the heaviest taxpayers and are held by them for the express purpose of reducing their taxes in the higher brackets. The tables of comparative income on taxable and non-taxable bonds show that the large taxpayers get as much net income from a 5% tax free farm loan bond as from a taxable bond yielding from 17% to 22%. It is obvious by comparing these ratios of return with the difference in yield on taxable and non taxable securities at the present market price, that the borrower on tax-free securities does not gain what the taxpayer saves by buying them. Four-fifths, at least, of the taxpayer's saving in taxes is a net loss to the state and its beneficiaries, on the basis of these reasonable calculations.

The Hardship on Private Borrowers

These comparisons of the relative returns to the investor on tax-free and taxable securities, bring us to another serious danger in the present situation. We have seen that a taxable security must pay 17% to 22% to the millionaire to warrant his purchase of it in preference to a tax-free bond. Even the man with a taxable income of $50,000 to $100,000 must get from 8% to 14% on a taxable bond to retain as much net income as he would derive from a 5% tax-free bond. In such a state of affairs, what is the corporation or individual who must borrow without the government subsidy of tax-exemption going to do? No staple business can continue to pay rates that will compete with these rates we have quoted as being necessary to interest the wealthy investor in taxable securities. Already we have the spectacle of the strongest companies in the country paying a gross rate of 8% for money, while the cross-roads village borrows at 5%. Tax-exempt municipal securities for 1919 will aggregate $600,000,000.

The tax-exempt obligation of the frontier farmer commands a more favorable rate than the bonds of the United States Steel Company or the underlying utilities. The New York State Commission on Reconstruction has recommended that urban real-estate mortgages to the amount of $40,000 in the hands of the holder be exempted, in order to save the plight of borrowers in the cities, and to relieve the housing situation. The President of the largest city mortgage company in the country testified that "Investors are running away from mortgages and will continue to do so, (because) government bonds just issued, paying 4¾%, yield a larger (net) return than 5% and 5½% mortgages."

What is true of the unsubsidized borrower on real-estate mortgages is not less true of other classes of borrowers. All private enterprise in the country is threatened, for the competition of tax-exempt securities has only just begun to make

itself felt, and must increase as refunding operations become necessary and the volume of tax-exempt securities increases. Imagine the consequences, for example, if railway and public utility securities were to be sponsored by the government, as is proposed in many quarters, and this vast volume of securities made tax-exempt. On the other hand, how are these vital services to be financed, not only for present but future needs, if they must compete in the market with tax-exempt securities?

The Effect on the Market for Taxable Securities

The final danger to which we would call attention here, is the effect of this growing volume of tax-exempt securities on the market price of taxable securities. As the quantity of tax-exempt securities increases, they will naturally become cheaper through the operation of the law of supply and demand. At the same time, as the price of non-taxable securities falls, and the yield increases with the increase in the supply, these tax-exempt securities must become increasingly attractive to the investor. There must consequently be a corresponding decrease in the salability of taxable securities, and a fall in their price. This process, therefore, must inevitably depress the value of taxable securities now outstanding, with disastrous results to the holders. No investors will view this impending depreciation in taxable securities with more alarm than the officials of the savings banks.

We confront an impossible dilemma, fatal both to new enterprise and our present business fabric, unless an immediate halt is called on the issue of tax-exempt securities, and outstanding issues retired as rapidly as possible.

This drastic solution of the problem seems so obviously necessary as to require no further support. Briefly summarizing the argument, we find that the exemption from tax of the securities of government and government agencies:

1. Tends to create a governmental monopoly of the business of finance and banking;
2. Destroys the equitable working of our taxation systems, nullifying the income tax, and putting the burden on realty and those taxpayers least able to bear the burden;
3. Threatens to depreciate the value of outstanding taxable securities, and to make the financing of private business impossible, and
4. Thereby forces private business to seek government aid, and
5. Consequently destroys private initiative in business, and
6. Thus progressively checks all national progress and forces the country backward rather than forward.

Every tax expert and economist in the country who has expressed himself on tax-exemption, has condemned it. It has no defenders on any pleas but those of opportunism or special interest. It is a disease of the economic system that began in a small way, unobserved by any but experts, but it has now reached the acute stage, where the surgeon's knife is required to save the patient. Opiates will only make the case worse. The patriotic citizen will operate without delay, by supporting every measure to repeal existing tax-exemption privileges, and by helping to defeat every project for new tax-exempt issues.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Federal Income Tax—Deductions—Depletion Allowed Lessee of Mine.—A question always in dispute as to allowance of depletion as an expense to the lessee and operator of a mine worked on a royalty basis, has been determined by the federal district court in favor of the allowance. The court held that the question turned on the proper construction of section 12 of the revenue act of 1916, which the government claimed permitted the allowance only to an operating owner and not to an operating lessee. The court held that the question was so clear-cut and simple as to render an extended opinion unnecessary, expressed concurrence with

the reasoning of the plaintiff's brief and disagreement "wholly" with that of defendant. It is to be noted that in the revenue act of 1918 provision is made for an equitable apportionment of the depletion between lessor and lessee.—*Mohawk Mining Co.* v. *Weiss, Collector,* U. S. Dist. Ct., Northern Dist. of Ohio, Eastern Division, November 3, 1919.

Federal Income Tax—State Inheritance Taxes as Deductions.—The disputed question of whether a state inheritance tax is a "tax paid within the year" which is deductible in computing net income under paragraph B, section II of the Act of 1913, has been decided in the negative by the federal district court. The case involved a construction of the nature of inheritance taxes. The court's observations on this are interesting and somewhat disturb notions heretofore generally accepted. The plaintiff contended that the tax (imposed under the New York law) was upon the right to receive, and as it imposed a personal liability upon the devisee, it was a proper deduction. The government's contention was that the tax is an appropriation by the state of a portion of the decedent's estate before the remainder vests in the devisee as held in *United States* v. *Perkins,* 163 U. S. 625.

The court notes the confusion in the decisions and their unsatisfactory reasoning, and expresses the opinion that it does not follow that because the right to transmit or receive are not natural rights, the tax is imposed on either right, referring to Judge Gray's remarks in *Matter of Swift,* 137 N. Y. 77, as an accurate description of what occurs. The holding is that the property and the right to receive it, pass reduced by the amount of the tax; that the tax is not paid by the devisee out of his property but that he receives a net amount.

The discussion leaves one still in some doubt as to just what the nature of the tax is held to be and raises questions as to its status under the constitutional limitations requiring uniformity in property taxation if this is the nature of the tax.

The Treasury Department prints this decision in T. D. 2933, noting that it confirms and supports the ruling contained in Article 134 of regulations 45.—*Prentiss* v. *Eisner.* U. S. District Court, So. Dist. N. Y.

Federal Income Tax — Insurance Companies—Deductions—"Dividends".—The provision in the federal income act of 1913, § 2 G(b), that life-insurance companies shall not include in gross income such portion of premiums received as shall have been paid back or credited or treated as an abatement, refers to individual payments and does not permit the elimination of such credits allowed a policy-holder unless it has received a premium from him during the year and then only to the extent of such premiums received.—*Lederer* v. *Penn. Mut. Life Ins. Co.,* 258 Fed. 81.

Federal Income Tax — Liability of Bankrupt Corporation. — A trustee of a bankrupt corporation who was not carrying on its business, but was receiving funds as the result of a compromise made by him of a claim for non-payment of salary and commissions, was held not liable to pay an income tax under the Act of 1916, section 13(c), since under such section only net income earned by a trustee while actually operating the business of a bankrupt corporation, was taxable. The report of the referee, which was confirmed without opinion by the district judge, is set out in full in the report of the case in the circuit court of appeals and contains an elaborate discussion of the interpretation of the Act of 1916. It was held that the interpretation should be a fair one, that it was not the duty of the court or of the government authorities "to resort to Procrustean methods of interpretation against the taxpayer" and that the language in subdivision (c), relied upon by the government, showed that it was not intended by Congress to apply the tax in the case of receivers or trustees in bankruptcy or assignees who merely marshalled and distributed the assets of an insolvent corporation among its creditors. The order of the district court was therefore confirmed. —*In re Heller, Hirsh & Co.,* 258 Fed. 208.

Federal Income Tax — "Income"—Buildings on Leased Land. — The federal circuit court of appeals recently decided a case where taxable income was

claimed to have accrued to a landlord by reason of the forfeiture in the year 1916 of a lease and the resumption by him of the possession of the leased premises, thereby giving him the ownership of a building, placed thereon by the defendant in the year 1907. It was claimed that the value of the building constituted income for the year in which the forfeiture occurred. The court held that the lessor acquired nothing in 1916 except the possession of that which for many years had been her own; that such possession was not income; assuming, however, that it was income derived from the use of property, it was derived when the completed building was added to the real estate and the landlord received at that time a prepayment of a portion of the rental distributed over the period of the lease. The lease provided that ownership of the building was to vest immediately in the lessor, which occurred long prior to the year in question. The court expressed itself as free from doubt on the question.—*Miller, Collector* v. *Gearin,* 258 Fed. 225.

Internal Revenue — Munitions Manufacturers' Excise Tax. — In a series of cases argued and decided together, the circuit court of appeals had occasion to construe and apply section 301 of Title III of the Act of 1916, providing an excise tax on the manufacture, among other things, of projectiles and shells and the sale or disposition thereof. The cases involved the determination of who are to be deemed manufacturers of the mentioned articles or of the parts thereof when the process of construction of the completed munitions is divided among several firms, each being concerned with one or more steps in the process. The contracts were made by the defendants and the various subordinate steps turned over to subcontractors.

In the Carbon Steel Company case it was held that the basic and fundamental step was the making of steel of certain characteristics and that all later steps depended on this initial one and that this company was manufacturing shells and was subject to the tax. (See *Bul.* IV, 217.)

In the Worth Bros. case, certain of the steps in the manufacture were not absolutely necessary for the completion of the munitions, but were such as were required for general commercial needs. In this case also the company was held to be engaged in the manufacture of shells and to have been justly taxed. (See *Bul.* V, 59.)

In the case of the Forge Steel Wheel Company, the part of the work done was the construction of a form which was turned over to another contractor to shape and bore, requiring some twenty-seven distinct processes. It was claimed that the company was not engaged in the manufacture of a *completed* part and that the statute must be construed as requiring that the part must be so *completed.* The court rejected this contention, holding that the language of the act does not require such a construction. The taxes were therefore held to be properly levied in the case of the complaining taxpayers.—*Carbon Steel Company* v. *Lewellyn; Worth Bros. Company* v. *Lederer; Lewellyn* v. *Forge Steel Wheel Company,* 258 Fed. 533.

Internal Revenue—Special Tax on Banks.—The United States district court has recently held that the fact that a bank acted as a fiduciary, not thereby using any part of its capital or that it engaged in underwriting or promoting or that it dealt for its own account in stocks and bonds or other securities, to such extent not being engaged strictly in the banking business, did not exempt any part of its capital surplus and undivided profits from the special tax imposed by the act of Congress of Oct. 22, 1914. — *Fidelity Trust Co.* v. *Miles,* 258 Fed. 770.

A corporation engaged mainly in the business of examining and insuring real-estate titles but which also carried on a savings-bank business which it kept separate from its title business, was held taxable under the above act, only with respect to the amount of capital used in its banking business. — *Title Guarantee & Trust Co.* v. *Miles,* 258 Fed. 771.

Federal Corporation Tax—Net Income—Deductions—Bond Discount as Loss — Bookkeeping Facts. — The federal circuit court of appeals has affirmed a decision of the district court holding that the annual pro-rata amount of discount on bonds may not be deducted as a loss in determining net income under the corporation excise law of 1909. The claim was

that the pro-rata amount distributed over the life of the bonds and set aside by bookkeeping entries, should be regarded as a portion of the interest paid and deductible as such.

The decision in *Baldwin Locomotive Works* v. *McCoach,* 215 Fed. 967, and on appeal 221 Fed. 59, was held not conclusive, as in that case the department deemed it proper to allow the pro-rata portion as a deduction and the real question was as to whether the entire discount was deductible in the year when the bonds were sold, which the court decided in the negative. The court held that the present case was determined adversely to the contention of plaintiff by the plain language of the statute; the money set aside while prudent and proper, was not the payment of interest nor a loss actually sustained during the year; the money was not in fact paid out but was still in the possession of plaintiff; a system of bookkeeping will not justify the Government in claiming taxes nor the taxpayer in claiming exemption from taxes; the facts must control. (*Baldwin Locomotive Works* v. *McCoach*, 221 Fed. 59; *Mitchell Bros.* v. *Doyle,* 225 Fed. 437). The Department prints this opinion as a part of T. D. 2944, not as it says "as a ruling" but for "information".—*Southern Pac. R. R. Co.* v. *Muenter,* U. S. C. C. A., 9th Circuit, Oct. 6, 1919.

Federal Corporation Excise Tax—"Doing Business" — Admissions of Officers as Evidence.—A pipe line company which was organized and doing business but only as an agency for two other corporations which advanced to it all funds needed in its construction and operation and which was therefore claimed to be merely a conduit for the adjustment of the respective capital investments of the two other corporations, was held to be nevertheless "doing business" for profit and to be subject to the tax in question.

A statement by the auditor of the company to an agent in the Internal Revenue Department with respect to the fact as to the amount of the paid-up capital stock, which determined the extent of the interest deduction, was held admissible as against the objection that it was not authorized by the board of directors and was not binding, upon the authority of *Lane* v. *B. & A. R. R.,* 112 Mass. 463, and *Lynchburg Tel. Co.* v. *Booker,* 50 S. E. 148. The company was held not entitled to the interest deduction as not having paid-up capital stock at the time. — *Associated Pipe Line Co.* v. *United States,* 258 Fed. 800.

Federal Corporation Excise Tax of 1909—Deduction of Taxes on Corporation Shares Owned, Paid by Such Corporations.—The district court held in a recent case that taxes paid by corporations in which the corporation in question owned stock, were not "paid by it" and hence were not deductible in computing net income under the corporation excise tax of 1909.

The ruling of the Treasury Department, allowing such deductions where the stockholder had included the amount as income in the form of additional dividend, was held not in point even if controlling on the court, as in this case the taxes so paid had not been included in income.—*United States* v. *Aetna Life Insurance Co.,* 260 Fed. 333, also published in T. D. 2927.

State Income Tax—Constitutionality—Income as Property—Exemptions.—The Delaware income tax law (L. 1917, Ch. 6) has successfully withstood the first stage in an attack made upon general constitutional grounds, the court of General Sessions, sitting in banc, having overruled all grounds of objection.

The constitution provides in section 1 of article 8, that all taxation shall be uniform upon the same class of subjects and that the General Assembly may exempt such property as will, in its judgment, best promote the general welfare. It was contended that there was no power to enact any tax other than a property tax and that income was not property, the use of the word "property" in the provision for exemptions being claimed to limit the entire section. Reliance was placed mainly on the Georgia cases of *Savannah* v. *Hartridge,* 8 Ga. 23, and *Waring* v. *Savannah,* 60 Ga. 93, the cases of *Dyer* v. *Melrose,* 83 N. E. 6, *Wilcox* v. *Commissioners,* 103 Mass. 544; *Glasgow* v. *Rouse,* 43 Mo. 479; *State* v. *Frear,* 134 N. W. 673, 135 N. W. 164, and Black on *Income Taxes,* 19, being also urged in support of the contention. The court distinguished the Georgia cases as not involving the power of the state to tax incomes but as deciding

whether a particular income tax was authorized. The other cases were held to be distinguishable by reason of differences in the constitutional provisions and the court held, without difficulty, that income was property for tax purposes as well as for other purposes. They further held that the clause in question did not limit the General Assembly as suggested; that it had full power to tax incomes under the recognized power of a sovereignty to enact any and all taxes, unless limited and that the provision as to exemptions did not create the limitation claimed.

Further contentions were based on claimed violation of the due-process and equal-protection clauses of the federal and state constitutions and the uniformity clause of the state constitution by reason of the uniform exemption of $1,000 to each person regardless of marital state and dependents, the exemption of salaries of state officials and of rentals from real estate and income derived from agricultural operations. These various provisions were discussed and the reasons for them suggested and the conclusion reached that none of them presented ground for adjudging them so unreasonable or discriminatory as to violate the discretionary power of a state to adjust its tax laws in all reasonable ways. The general authorities on classification are cited and the classification by exemption, contained in the statute, declared to be clearly within the principles established as illustrated in the Delaware case of *State* v. *Wickenhoefer,* 64 Atl. 273. —*State* v. *Pinder,* 108 Atl. 43. (See BULLETIN, Nov. 1919, for subsequent changes in the statute.)

STATE CORPORATION FRANCHISE TAX ON NET INCOME—FOREIGN CORPORATION —CONSTITUTIONALITY — APPORTIONMENT OF NET INCOME — FOLLOWING FEDERAL FORM. — The Connecticut supreme court has passed upon the constitutionality of its corporation franchise tax on net income, as applied to a foreign corporation, and in doing so has rendered opinions of immediate importance. The opinions have not been published but, our attention having been called to them by Miss Elwood of the Tax Commissioner's office, we have, through her kind suggestion, been favored by the official Reporter, James P. Andrews, with the opinions.

The statute (L. 1915, Ch. 292, Part IV) imposes a tax upon all corporations doing business in the state, at the rate of 2 per cent of the net income upon which they are required to pay a federal income tax. If the corporation does business within and without the state, the tax is applied to a portion of the net income, apportioned upon tangible property within and without, if its principle business is dealing in such property, or if its principle business is dealing in intangible property, upon gross receipts within and without the state.

In the case under consideration, the company was a foreign manufacturing corporation with its entire manufacturing done in Connecticut and its entire sales made from a managing office outside the state. Its income was derived mainly from the sale of its manufactures, but it had income from rentals, repair work, investments and from sales of goods manufactured by others. Forty-seven per cent of its tangible property being located in the state, a tax was imposed upon that percentage of its net income, which was paid under protest and suit brought to recover, upon the ground that the statute was void as to it, because in violation of the commerce and due process clauses of the federal constitution.

The case was reserved by the superior court for advice of the supreme court upon an agreed state of facts, indicated above and others contained in the opinion, as to the constitutional questions mentioned and also as to the further one of whether the requirement of a disclosure of the return to the federal government was repugnant to section 2 of Article IV or to the Fourth, Fifth and Fourteenth Amendments of the federal Constitution.

The court considered first the nature of the tax, whether it was an excise as claimed by the state, or a property tax as claimed by the plaintiff, or an income tax as claimed by an *amicus curiae,* and held with the state, that it was a tax in the nature of an excise tax for the privilege of doing business in a corporate capacity in the state. It was not a property tax because the property was otherwise taxed and no tax was imposed unless net income was shown. It was not an income tax because not imposed unless the corporation was doing business in the state, and then only

on such income as arose from business in the state.

The objection of interference with interstate commerce was met by reliance upon the *Glue Company* case (247 U. S. 321), from the opinion in which extracts were cited, which were held to clearly cover this case. The plaintiff claimed that that case was authority only for a tax on the net income of domestic corporations, which was held to be refuted by the plain statement at page 326 of the opinion. The effect of that decision was stated to be that a state, within the limitations of reasonableness, may tax the entire net income of a domestic corporation, engaged in interstate commerce, and that, as a logical sequence, it may tax a portion of the net income of a foreign corporation so engaged, provided the apportionment produces reasonable results. Figures are given showing, in its opinion, entire absence of unreasonableness in the effect of the tax as compared with the property and business in the state.

The decision in *Baldwin Tool Works* v. *Blue,* 240 Fed. 202, is cited as directly in point and Professor Powell's criticism of that decision and his subsequent qualification, are referred to.

The issue raised as to violation of the Fourteenth Amendment, because the tax was applied to income derived from sources without the state and from property located outside, is met by the suggestion that the argument proceeds from the erroneous assumption that the tax is an income tax and not a privilege tax, measured by net income, and that it is applied to only a portion of the entire income. The real question is stated to be whether a privilege tax of 2 per cent on 47 per cent of plaintiff's income, is a tax on business outside the state, which it answers easily in the negative, again referring to the figures to show the absence of unreasonableness as the effect of the apportionment.

The objection to the use of the federal return is dismissed with little discussion, as involving no delegation of legislative authority but being a convenience to taxpayers and an economy in administration and as violating no constitutional privilege of the corporation.

Judge Wheeler, in dissenting, enters upon a careful discussion of the fundamental questions, in an elaborate and well-considered opinion which will repay careful examination by those interested, in view of its specific analysis of the pertinent decisions of the United States Supreme Court.

The gist of his dissent rests upon his departure from the majority in holding that the tax is a privilege tax while disregarding the limitations fixed by the Supreme Court upon such a tax, requiring it to be so measured as not, in reality, to be palpably unreasonable, through absence of a maximum limit as in *Baltic Mining Co.* or through elimination in its computation, of income earned or property located outside the state, as in *Cudahy Packing Co.* v. *Minn.*

His essential objection is that the apportionment of the tax is not in fact made to depend upon the property and business in the state which he holds to be required to sustain the tax based thereon; that the use of tangible property in and out of the state, in view of the facts as to the operations of the company, necessarily imports into the state income not earned there, and that, such being the case, the reasonableness of the resultant tax cannot overcome the constitutional prohibition against taxing property and business beyond the jurisdiction of the state, quoting from Mr. Justice Vandevanter in *Int. Paper Co.* v. *Mass.,* 246 U. S. 135 at p. 189, that a violation may not be sanctioned because small.

He makes the pertinent suggestion that the decision in the *Glue Co.* case does not touch this point as in that case, the sole question was as to the right to tax income from interstate commerce and the propriety of the apportionment was not involved; and the statute there expressly recognized the need of exempting property and business outside the state.

Those who have puzzled over the decisions will easily sympathize with his suggestion that the new theory of "indirect encroachment" cannot remove the difficulty arising in their minds, of justifying taxes which have seemed unconstitutional when "measured by" unconstitutional criteria.

He summarizes his dissent in the statement that "read and applied as our court reads and applies the Oak Creek case, as it seems to me, practically treats as overruled the authorities from *Western Union* v. *Kansas,* 216 U. S. 1, down."—*The Underwood Typewriter Co.* v. *Chamberlain. Treasurer,* Conn. Supreme Court of Errors, May Term, 1919.

STATE INCOME TAX—"FISCAL YEAR".—The legislature of West Virginia at the second extraordinary session, 1919, passed an act to take effect on its passage, March 31, 1919, providing for the payment of an annual excise tax of ¼ of 1% upon the net income of corporations and declared that such tax should be levied "for the state fiscal year 1919". The state fiscal year begins July 1. Complaining corporation filed its return June 2, 1919, showing net income for the calendar year 1918 upon which the state assessed a tax of ½ of 1% under the act of 1915 and of ¼ of 1% under the act above described. The corporation paid the tax under the act of 1915 and refused to pay that under the act of 1919, claiming that the latter act authorized only a tax for the year beginning July 1 and hence one which could not be assessed in June. The court held that the fact that the legislature passed the act having in view extraordinary expenses showed that it must have intended the revenue to be immediately available to provide for such expenses, liability for which was assumed by acts adopted at the same session, and further that by making the act effective upon its passage on March 31, it understood that the revenue therefrom would be immediately available and would not be postponed a year. The phrase "fiscal year 1919" was therefore held the fiscal year ending June 30, 1919, and the tax held valid and an injunction refused.—*Turkey Knob Coal Co.* v. *Hallanan*, 99 S. E. 849.

INHERITANCE TAXES—SHARES IN REAL ESTATE TRUSTS AS PERSONALTY. — The United States Supreme Court has dismissed a writ of error from the Supreme Court of Massachusetts in an inheritance tax case on the ground that the Massachusetts decision was rendered subsequent to the enactment of Chap. 448 of the Act of Congress of 1916, providing that a writ of error shall not lie except in cases where the validity of a statute is brought into question as repugnant to the federal constitution, treaties or laws. As the validity of the state law was not in question, the court held that application for review should have been made by writ of certiorari instead of writ of error.

The Massachusetts court sustained the tax on shares owned by a resident in two "trusts", rejecting the claim that the shares were not subject to the tax in so far as they represented ownership of real estate in other states. These trusts had been established under declarations of trust providing that the property constituting the trust should be held by trustees, that the beneficial interest in the trust estate should be divided into shares represented by transferable certificates, and that there should be meetings of shareholders for election of trustees and other purposes. The property held by the trustees consisted of both real and personal property. The greater part of the real estate was located in foreign states. It was convertible into personalty upon the termination of the trusts and, under certain conditions, prior to termination. The Court held that the estates created by the declarations of trust were partnerships but were not governed by the rules of ordinary partnerships. Under an ordinary partnership, real estate could be sold only to pay debts, and for all other purposes remained real property. The same rule did not apply to the partnerships created by the trust declarations. Under the declarations, the real estate and personal estate constituted one fund represented by transferable certificates. While the real estate had not been converted into personalty at the date of the death of the owner of the shares, it might ultimately be so converted. Referring to the special conditions affecting this kind of partnership, the court declared: "Where real property is held to be converted into personalty because with personal property it is made one fund and all the fund is ultimately to be personalty it cannot be one fund from the beginning unless the conversion takes place from the beginning." The shares were accordingly held to be shares in personalty from the beginning having a situs at the domicile of the deceased owner and subject to the Massachusetts inheritance tax.

The assessment of a succession tax on the beneficial interest in a third trust was not sustained, as the trust estate consisted entirely of real estate in a foreign state, as it could be converted into personalty only at the termination of the trust, as the beneficial interest was not represented by certificates, and as there was no provision for meetings of the owners of the beneficial interest nor for their association in any

way. The terms of the trust were declared not such as to make the interest of the Massachusetts owner personalty.—*Dana* v. *Dana,* 116 N. E. 941; Writ dismissed 250 U. S. 220.

Inheritance Taxes—New York Penalty Tax on "Investments"—Exemptions. — One unlooked-for result of the penalty tax enacted in New York in 1917, to render more effective the annual tax on investments, has recently appeared. The penalty tax in question was an additional 5% tax on the transfer of "investments" when found in a decedent's estate upon which neither the investment tax nor the ordinary property tax had been paid during the lifetime of decedent.

Under the New York inheritance tax law certain educational institutions are exempt from tax. Columbia University, one of such exempt institutions, was the sole legatee of a recent decedent. It resisted the imposition of the penalty tax assessed upon untaxed investments, claiming that the exemption extended to this tax as well as to the regular transfer tax. The state contended that this was not the case and the surrogate's court sustained the claim of the state and held the tax properly assessed as being a charge upon the estate which must be met before transfer, even to an institution exempt from the ordinary inheritance tax. — *In re Kean et al.; In re Van Cortlandt's Will.* 177 N. Y. Supp. 789.

Inheritance Tax — Deduction of Federal Estate Tax—Statutory Definition of Conveyance in "Contemplation of Death" Upheld.—The Wisconsin supreme court has held in *Estate of Week,* 172 N. W. 732, that the federal estate tax is not a lawful deduction in determining the net estate subject to inheritance tax. This decision was affirmed in *Estate of Ebeling,* 172 N. W. Rep. 734.

The latter case also contains the first construction of the amendment of 1913 to the Wisconsin Statute which reads as follows:

"Every transfer by deed, grant, bargain, sale, or gift made within six years prior to the death of the grantor, vendor, or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."

The above amendment was the first adopted by any state defining conveyances in contemplation of death so as to avoid the evasion through gifts of the tax that would be normally due in estates, which evasions have become extremely common, as indicated by the large number of decisions affecting conveyances alleged to be in contemplation of death.

The amendment referred to was copied verbatim in one or two states, and was copied with modifications in a number of other states, and in the federal estate law, but no previous decision is found construing its effect. The court sustains the statute in its purpose and integrity and holds that a conveyance of a material part of decedent's estate, made within six years prior to death, without an adequate valuable consideration, is a conveyance in contemplation of death within the meaning of the statute.

Inheritance Tax — Non-Resident Decedent — Jurisdiction — Collection. —A resident of New York died in 1912 leaving in his estate shares of stock of a Kentucky corporation. The Kentucky inheritance tax law was adequate to impose a tax on the transfer of such shares but the statute failed to provide for the assessment thereof except in the county where the non-resident owned real property. As this decedent owned no real property, the tax could not be assessed, but because of possible penalties the corporation refused to transfer the shares. The executors there upon instituted a proceeding to determine the right of the state to the tax claimed, the amount of which, if due, was undisputed. Prior to the suit, an amendment remedied the defect in the previous act and provided by act passed in 1914, means for enforcing the tax. The executor claimed that as this act was passed after the death of testator, its provisions could not have a retroactive effect.

The court held that the inheritance tax act imposed a valid tax and that the valuation and other steps were but methods of ascertaining the amount of the tax which was not upon property but upon the right of taking by will or descent; that an inheritance tax could be collected at any

time prior to distribution and that as the property in this case had not been distributed, the legislature could cure any defects in the law by which the tax was imposed or collected, even though a retroactive effect would result, citing *Ferry* v. *Campbell,* 81 N. W. 604; *Montgomery* v. *Gilbertson,* 111 N. W. 964; and *Ross on Inheritance Taxation,* § 36.

The New York case of *Estate of Pettit.* 72 N. Y. Supp. 469, was criticized as failing wholly to discriminate between a general property tax and a tax on the succession of property and as without cause assuming that the amendatory act sought to be applied was, by reason of its retroactive effect, unconstitutional. The judgment of the lower court, sustaining the right of the state to the tax, was affirmed. —*De Witt* v. *Commonwealth.* 212 S. W. 437.

Inheritance Tax — Settlement between Beneficiaries—Computation of Tax.—The question presented to the Minnesota supreme court was whether, when there is a purported will, the beneficiaries shall pay the inheritance tax upon the amount actually received out of the estate according to a decree of distribution entered into upon a good-faith compromise between them or should each pay upon the portion designated as the share in the will.

The court adopts the former view, which it sustains by reference to the nature of the tax as upon the transfer and not upon the estate, emphasizing the importance of the receipt by the beneficiary as measuring the tax and suggesting the non-application of the tax if a beneficiary refuses the legacy. The opposing decisions of the courts of Massachusetts, Illinois, and New York are discussed and in part distinguished.—*State ex rel.* v. *Probate Court,* 172 N. W. 902.

Public Purposes.—The United States district court has upheld the constitutional amendments and laws adopted in North Dakota as a part of the program of the Nonpartisan League, as not authorizing the taking of property of the taxpayers without due process of law. The questions involved were whether the amendments and statutes which authorized the issuance of bonds to enable the state to embark in various business enterprises, including a state-owned bank and state-owned elevators, would result in taxation for private purposes as distinguished from public purposes. The court, in a lengthy opinion which is characterized by a somewhat unusual endorsement of legislative policies and by a criticism of prior decisions holding opposite views, sustains the legislation in question as not in violation of the Fourteenth Amendment of the federal constitution.—*Scott et al.* v. *Frazier,* 258 Fed. 669.

Tax Limitations — Basis of Limitation — Taxable Property — "Last Assessment".—A decision of interest on the important subject of tax limitations, particularly in states where classification is provided through fractional valuation, is that recently rendered by the Montana supreme court. The question decided was as to the basis of the limitation. The constitutional provision (§ 5, Art. XIII) was that the indebtedness should not exceed 5 per centum "of the (value of the) taxable property therein [i. e. in the county] to be ascertained by the last assessment for state and county taxes previous to the incurring of the indebtedness." The general statute provided that all taxable property should be assessed at its full cash value. The court readily held that this provision was still in force and that the use of fractional valuations, under the classification statute, being merely a mathematical process for the computation of individual tax bills, did not produce a lower value for the "taxable property", thus decreasing the base of the limitation.

A further point of interest was as to what was the "last assessment". The indebtedness was required to be authorized by an election. This was held September 2, 1919, and the indebtedness approved. At the time of the election the last completed assessment was that for 1918 and aggregated $17,000,000. The aggregate of the 1919 assessment, which was not then completed, was $46,000,000. The indebtedness in question was $800,000, which was over 5% of the 1918 assessment, and hence would be excessive. The court held, citing authorities, that as the 1919 assessment would be completed before the indebtedness could become an actual obligation, it should govern, and that hence the indebtedness in question did not exceed the constitutional limit.—*State of Montana* v.

County Commissioners of Hill County. Montana Supreme Court, November 5, 1919.

Banks—Collection—Tax on Stockholders—Notice—Jurisdiction. — The recent decision of the Minnesota supreme court as to the nature of a tax on national bank stockholders and the collection thereof, is of importance in several aspects. In this case one bank had sold its assets to another and was in liquidation on assessment date. Its stock, however, was still outstanding. The assessor first assessed the stock in the name of the bank as permitted by the statute, but it was held in a previous decision that the bank was not liable because it had no earnings or assets belonging to the stockholders at the time the tax levy was made. (*State* v. *Security Nat. Bk.*, 165 N. W. 1067, *Bulletin* III, 127.) On the second trial the court, without citation or notice, ordered judgment against the stockholders. Certain of the stockholders then appeared specially and moved to vacate the decision on the ground that the court had no jurisdiction to give personal judgment against them. The motion was denied and an appeal was taken resulting in the present decision.

The court adhered to the view that the stock was without doubt valuable taxable property until canceled and the new stock of the purchasing bank issued in payment for the assets purchased. The contention by the stockholders that they were not liable, led the court to discuss fully the nature of the tax on bank shares as it has been interpreted by the courts of the various states under their varying tax laws. Admittedly it could not be a tax against the bank and, being personal property, it could not be a tax *in rem* against the stock, personal taxes being taxes *in personam* against the taxpayer. The form of assessment adopted, whether in the name of the stockholder, or of the bank, or whether on the shares as such, was held immaterial and the tax designated as in substance one against the stockholders on account of ownership of stock, the bank being constituted a tax collector to collect the tax from the stockholders.

The contention was made that as the only method of collection expressed in the statute was by appropriation from the assets of the bank, there being no assets, no tax could be collected and the state must lose the tax. This serious result was held not to be reasonably inferred. No affirmative provision for tax liability is necessary. Such absolute liability is presumed and it would require clear language to relieve stockholders from taxation upon their shares merely because the bank had made no earnings from which, under the contention, the tax must be paid.

It was urged that the fact that no provision was made for enforcing the tax against the stockholder indicated an intention that no liability on the part of the stockholder obtained. This the court rejected, holding that the laws of the state were adequate to collect the tax from the stockholder.

The court, however, reversed the judgments upon the ground that the court acquired no jurisdiction to render a personal judgment in the absence of citation and notice; that the entry of judgment against the stockholders shown on a list submitted by the bank in a proceeding instituted against it, was not authorized, as thereby the stockholders were denied a fundamental right always recognized in our system of jurisprudence, i. e. notice before judgment. A judgment in a tax proceeding possesses all the elements of any judgment *in personam*. It is enforceable by execution. Personal notice is as essential to give jurisdiction to render judgment in such a proceeding as in any other. The decisions in *Tappan* v. *Bank*, 19 Wall 490, and *Corry* v. *Baltimore*, 196 U. S. 466, are interpreted as indicating the jurisdiction of a state over stockholders for the assessment of a legal tax a different thing from the enforcing of a personal judgment against a stockholder to collect such a tax.

The court takes occasion to allay the fears expressed by the state that the power to collect the tax at all will fail under this decision. "There is no doubt," they say, "that a tax on stock assessed in the name of the bank is a valid tax and is binding as such upon both the bank and its stockholders." Citing numerous authorities.—*State* v. *Security Nat. Bk.*, 173 N. W. 885.

Uniformity — Full Value Assessments—Tax Limitations—Federal and State Construction.—A recent decision by the federal district court presents questions of interest from several angles. Com-

plainant recovered judgment on county warrants lawfully issued by Van Buren county, Arkansas, which he had purchased subsequent to the decision of the federal circuit court of appeals in *U. S.* v. *Jimmerson,* 222 Fed. 489, but prior to the decision of the Arkansas supreme court in *State* v. *Meek,* 192 S. W. 202. The county was unable to pay the warrants from the general fund as assessments were, by order of the state tax commission, made at 50% of full value and the constitution limited the rate to 5 mills on the dollar. The laws expressly prohibited the levy seizure and sale of county property under execution. Plaintiff brought an action in mandamus to compel the assessor to assess property at full value pursuant to the constitutional requirement. It appears that in the *Jimmerson* case the federal court had held that the complainant in a similar situation, was entitled to a writ compelling the assessor to assess the county at full value, while subsequently in the *Meek* case, the state supreme court had held to the contrary and that the constitutional requirement of uniformity and equality was superior to the direction to assess at full value and that to assess one county at full value while others were assessed at 50% would create an unconstitutional inequality and would not be ordered. In this situation the district court in the instant case, after a careful statement of the pertinent authorities, held itself to be bound by the decision of the state court as to the interpretation of the constitution and laws of the state, following *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, and citing as directly in point *Fairfield* v. *County of Gallatin,* 100 U. S. 47, 52, 55.

Being confronted with a decision of the highest state court expressly holding that years before the cause of action arose, it had held the uniformity clause to control the full-value-assessment statute and that in case of conflict, the latter must give way, the court asserted its obligation to follow that court and denied the petition for mandamus.—*United States ex rel.* v. *Cargill,* 258 Fed. 458. See also *Bulletin* II, 234.

VALUATION METHODS—ALLOCATION OF INTERSTATE PROPERTIES.—One of the laws enacted at the 1919 regular session of the Montana Legislature, forming a part of the somewhat extensive changes in that state, has already been subjected to court review as to its constitutionality. The law in question provided for the assessment of utilities operating in more than one county, by the State Board of Equalization, and laid down a method for such assessment which required that board to take into consideration the entire property, both in and out of the state and to pro-rate the same on a mileage basis. The Montana Power Company, one of the companies affected, appears not to have been assessed by the state board in accordance with the statute. The attorney general of the state brought an original action in mandamus to compel the board to comply therewith, alleging non-compliance, and that as a result the property in question was greatly underassessed, in violation of the general provisions for full value affecting all property. The board sought to dismiss the proceeding by motion to quash the alternative writ issued commanding the board to comply with the statute, upon the argument of which motion, constitutional questions were raised involving general questions with respect to the assessment of this class of property.

The act in question was attacked as in violation of the constitution in that the state board could not be authorized to make an original assessment upon the theory that as the constitution expressly permitted such an assessment in the case of railroads, the power was impliedly lacking as to other property. The court readily disposed of this contention by reference to the well-established doctrine that a state constitution is not a grant of power but operates to restrict and limit what would otherwise be an unlimited exercise of the sovereign power which exists in the legislature.

A question of more general interest was that raised by the contention that the direction to consider the entire property and to pro-rate on a mileage basis would necessarily involve the assumption of jurisdiction of property beyond the limits of the state and would import into the state values not rightfully there, in violation of the due-process clause of the United States constitution and of the principle of uniformity established by the Montana constitution and statutes. As to this, the court, in very apt and conclusive references to the pertinent cases, holds that the

statute in question must be read in the light of other general laws and the limitations announced by the courts with respect to the jurisdiction of a state, suggesting that the method prescribed does not absolutely require compliance literally, but that it is to be used as a guide in making the apportionment of valuation to the state; that if it can be shown that property within the state has a value relatively greater than would be produced by the application of the mileage pro-rate, or if property exists in other states which cannot properly be apportioned, due allowances should be made; that the statute, as so interpreted, would clearly limit the board to the ascertainment of such property as is within the jurisdiction and thus reach the full fair cash value of that property only.

The facts as alleged were that the property in question had been reported in its entirety to the various county assessors and had been assessed by them and that the state board had failed to correct such assessment by assuming original jurisdiction and making the assessment which the statute in question directed them to make. The petition for the writ included the demand that the writ should direct the board specifically as to the assessment of the property under the statute. The court limited its consideration to the allegation that the board had failed to make an original assessment and refused to issue the special direction prayed for as being improper. It held simply that the board had failed to perform the duties cast upon it by the statute and overruled the motion to dismiss, leaving the board to answer, in default of which peremptory writ would issue.—*State of Montana* v. *State Board of Equalization,* Montana Supreme Court, November 6, 1919.

CORPORATIONS — CAPITAL STOCK — INVESTMENTS IN STOCK OF OTHER CORPORATIONS — DECISION BY DIVIDED COURT AS PRECEDENT. — In an appeal by the state from a decision of the lower court holding that in assessing the capital stock of a domestic corporation, deduction should be made on account of investments in the stock of other domestic corporations, the decision of the lower court was affirmed by the Mississippi supreme court, for the reason that in a previous case between the same parties involving a similar state of facts the judgment of the lower court was affirmed, as the judges of the supreme court were equally divided upon the questions of law. This affirmance had been held in a previous case (77 So. 253) to constitute a judicial precedent which was required to be followed until overruled.

The discussion of this feature of the case comprises the greater part of the opinion, which is further elaborated in a lengthy dissenting opinion. It is stated that the action of the court in treating the affirmance above described as a precedent is contrary to the practice in all the courts of last resort, except the supreme court of South Carolina, which indicates the importance of the discussion alluded to.—*Robertson, Revenue Agent* v. *Mississippi Valley Co.,* 81 So. 799.

RAILROADS—LOGGING ROAD—FINALITY OF TAX COMMISSION'S FINDINGS — INJUNCTIVE RELIEF.—The action of the Arkansas Tax Commission in assessing the entire length of a railroad as such, whereas a considerable portion consisted of an extension used wholly as a log or tram road used in connection with the railroad and owned and operated by its subsidiary, was contested upon the claim that the tram road extension was not such a railroad as the commission had jurisdiction to assess, and hence the assessment was illegal and void as to that portion of the mileage. The commission contended that the log road extension over the private property of the lumber company, being operated in connection with the railroad mileage and being used for transportation of timber in the equipment of the railroad, was within its jurisdiction for assessment. The court, upon a consideration of the facts, held that the extension was used wholly and entirely as a private tram or log road for the benefit of the lumber company and that the assessment by the commission was illegal and void to the extent of the log road mileage, there being nothing in the statute giving authority to the commission to assess such roads owned or used for private purposes by private corporations.

It was also claimed by the commission that inasmuch as the railroad had appeared and filed a petition to reduce the assessment, which was considered and a reduction denied, its decision became a final adjudi-

cation which could not be reviewed except for fraud or want of jurisdiction (13 S. W. 254). As to this, the court held that the case came clearly within the exception because the board had considered and included elements of value not owned or used by the railroad as a public carrier, that this clearly amounted to an illegal exaction or the taking of property without due process of law and that such action entitled the taxpayer to injunctive relief. The court affirmed the judgment below which exempted the railroad from the payment of that portion of the assessment placed by the tax commission on the railroad in excess of the true railroad mileage as determined.—*State* v. *Mississippi A. & W. Ry. Co.,* 212 S. W. 317.

Situs—Intangible Property—Decedent's Estate — Executors — Retrospective Exemption Statute.—The Virginia supreme court has held that the proper situs of intangible property of a decedent's estate is the county of his last residence and that when executors hold property it should be listed and taxed there; that an executor, though acting in a trust capacity, is not a trustee so long as the estate is undistributed and his accounts are closed. The case involved the legality of taxes levied on omitted assessments for several back years, made by the commissioner of the revenue for the district. It was claimed that the assessments were invalid because real estate and tangible personal property were not generally assessed at their fair market value. While not a particularly important point in the case, the opinion is of interest because of its reference to numerous observations by courts and text-writers in commenting upon the impossibility of securing perfect equality in taxation.

The low-rate classification law of 1916 for intangible property is cited as making a comparison with real property and tangible personalty of little aid in determining the question of inequality and the court found no indication of such. One point of importance is the holding that the exemption from back assessment of intangibles, introduced at the time the classification act was enacted, operates to nullify such assessments even when made prior to the passage of the exempting statute for a back year within the exempt period. It is held that the state acquires no vested right in omitted taxes.—*Rixey's Executors* v. *Commonwealth,* 99 S. E. 573.

Mandamus — Compelling Execution of Tax Law — Licenses — Ginning Tax —Duty of Tax Commission. — The supreme court of North Carolina recently granted a petition in mandamus presented by the Governor and other state officials to compel the state tax commission to establish machinery and enforce a license tax on cotton ginning, the proceeds of which were to go to provide a fund to safeguard the state warehouse system established by the act of which the tax provision in question formed a part. The commission had refused to execute the statute, following the opinion of the Attorney General that it was unconstitutional. Various grounds of illegality were raised, the principal one appearing to be that the act imposed the tax *on* each bale of cotton to be collected *through* the ginner. This language was claimed to make the tax a property tax and hence to render it unconstitutional because not levied *ad valorem* as required by the constitution. The court readily held the tax an occupation tax measured by the bale as a unit. In an extended argument as to the beneficial effect of the legislation, the court sharply criticized the commission for assuming veto power over legislative acts which it says they should obey unless enjoined by the courts.—*Bickett, Governor et al.* v. *State Tax Commission,* 99 S. E. 415.

Licenses — Excessive — "Net Income". — In determining the reasonableness and hence the legality of local licenses on telegraph companies conducting both interstate and intrastate business, much difficulty has been encountered by the courts and the decisions are unsatisfactory. In general, taxes have been upheld in the absence of clear proof of confiscation, and such proof has been difficult of application owing to the complexity of the subject. In a recent Georgia case a rule for determining the net income to be used in judging of the reasonableness of the tax was suggested which would seem to be useful in other cases. The tax in this case was $100 and, under the rule adopted, the net income at the office in question was found to be less than $180, which was held to be

unreasonable, excessive and therefore invalid under the authority of *Atlantic Postal Cable Co.* v. *Savannah,* 65 S. E. 184; *Postal Telegraph-Cable Co.* v. *Cordele,* 82 S. E. 26; *Morton* v. *Macon,* 36 S. E. 627; *Mayor* v. *Cooper,* 63 S. E. 138, and *So. Exp. Co.* v. *Ty. Ty.,* 81 S. E. 114.—*Western Union Telegraph Co.* v. *City of Fitzgerald,* 100 S. E. 104.

SPECIAL ASSESSMENTS — NOTICE—DUE PROCESS.—The extent of jurisdiction of a municipality over the formation of assessment districts and the apportionment of the cost among the properties benefited, was recently announced in a decision by the United States supreme court.

A statute of Oklahoma authorized municipal corporations to establish general sewer systems and also to cause district sewers to be constructed having limits defined by ordinance. It was contended that the statute was void, because it made no provision for notice and hearing by property-owners as to the district limits or the details of construction. It was conceded that the legislature could itself fix assessment areas without advance notice but it was claimed that when the legislature delegated the process to a board or other tribunal, property-owners are entitled to a hearing before their lands are included.

It was held that the delegation of the power to a municipality had the same effect as though the legislature had itself acted, and hence no notice was necessary and there was no lack of due process as the computation was a mere mathematical calculation, citing *Withnell* v. *Construction Co.,* 249 U. S. 63, 70. The legislative discretion thus exercised was held to be of course subject to judicial relief in case of actual abuse of power or of substantial error in execution. — *Hancock* v. *City of Muskogee,* 250 U. S. 454.

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

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VOLUME TWELVE

It is with no little embarrassment that we again refer to the delay in completing the publication of the Proceedings of the Chicago conference. We had confidently hoped to be able to distribute the first copies during December, but further exasperating delays occurred making that impossible.

It is perhaps not easy for all members to appreciate the reasons for a delay of such length, but those who have come into contact with the difficulties experienced in the printing and publishing trade, will have been able to understand our situation during the past few months. The final work on the index is now being done. The press work is about completed and we hope to see the binding finished and distribution of copies begin before this issue of the BULLETIN reaches the members.

In expressing our cordial thanks for the cooperation and encouragement given us during the past year, may we also express our sincere wish that the New Year may see a general restoration of public confidence in government with its corresponding contribution towards the happiness and success of all members whether their duties be public or private.

FEB 6 1920
UNIVERSITY OF TORONTO

THE OHIO AMENDMENT AGAIN

The temptation is strong to dwell further upon the Ohio situation which was discussed at length in the December issue. The unique opportunity is afforded to study the lessons to be drawn from a campaign for tax changes in a state so thoroughly representative of average American conditions, with both urban and rural population, diversity in soil, occupations and industries and a general educational development which is probably not excelled by any other state. If, under these conditions, students of taxation fail to find some important assistance of general application, taxation is indeed a subtle and fleeting thing—a political plaything, instead of the practical business which we have contended it is, and for the efficient conduct of which the members of this Association have labored so long.

With these considerations in mind we have, in this issue, continued the examination of the results of the November election, seeking to explain its meaning not alone or chiefly for the benefit of our Ohio friends, but to enlighten members everywhere as to the contending forces which

may be expected wherever it is sought to revise, rearrange or readjust the methods of taxation so as to make them more effective or to equalize its burdens.

We suggest that we disabuse our minds of the idea that ignorance, misinformation and prejudice are the forces operating to prevent some practical compromise measures to replace those of ancient vintage which are conceded by all sides not to be satisfactory under present-day conditions. We are inclined to think that progress towards a solution of the problems presented will be aided if we assume that quite different traits predominate, that self-interest, keen appreciation of the merits of — for instance — classification, where applied to suit the particular individual in question, fairly complete knowledge of the operation of tax laws and of the reactions of human nature towards the various kinds of taxes, may be usually anticipated. Furthermore, it will be well to bear in mind that the "last word" in tax methods has by no means been said; that constitutional freedom should not be regarded as an *end* but that a long, long road lies ahead after that freedom is obtained under which a start may be made towards efficiency and justice in taxation.

Some suggestions have come in since the December issue went to press and may be commented upon:

The state auditor objected because he felt that every legislature would spend its time revising classification rates for the benefit of some particular class or group. He is also reported to have opposed the amendment because it did not include a tax limit for real estate. — Here we have the rub of the matter and a fair idea of one very effective method now employed to defeat proposals for freeing the constitution from the restraints imposed by the "uniform rule". These objectors are in reality classificationists, for one or another species of property—in this case real estate. If they could get these particular classifications, they would not oppose the constitutional change. The difficulty is in fairly meeting that argument in the turmoil of a campaign, as it is in reality not an opposing argument. It is an argument *for* classification but used in contrary fashion. The suggestion is logical, and if justified should be admitted. It is, however, a matter needing careful analysis, to discuss the relative propriety of classification as between indestructible property and property that is used up or consumed or changed in form in the activities of the owner, or property having a fixed income, such as certain kinds of intangibles. We may remark here that classification is likely to become a political football unless its true functions and its limitations are carefully understood and asserted.

The effective argument is made that in states having classification we do not find the large additional revenues promised, with a lowering of the tax on visible, tangible property.

The movement was criticised as being an attempt by tax-dodgers to legalize the continuance of such practices. — This, of course, refers to the escape of intangibles under the general property tax.

There are other and more equitable ways of raising increased revenue less open to the objection of exciting resort to political influences at every legislative session.

The multiplicity of ballots voted on at the election with the great interest centered in the amendments on the liquor question caused the classification amendment to be largely overlooked.—This point does not seem to be borne out by the statistics. The totals of the votes cast on the three liquor amendments were 979,473, 951,715 and 1,000,318 respectively, while 957,139 votes were cast on the classification amendment.

The Ohio State Grange was said to be working for a state income tax and considered the amendment an obstacle.—This is hardly seen in view of the fact that from recent reports the rural vote in the legislature which reconvened, since the election, has so far succeeded in defeating an income tax bill.

The single-taxers were actively opposed to the amendment. — In the last issue we quoted support by the single-taxers as a reason for opposition to it.

Radical elements opposed classification.

—This also is a contrary view to that heretofore expressed.

Because of the long-drawn-out contest in the legislature ignorant people became suspicious and thought something must be wrong. — We should hardly confine this specification to the ignorant.

Many thoughtful people considered that the constitutional safeguards for private property would be thrown away and under the guise of classification, property could be confiscated.—This comment is very seriously urged and evidently describes one sort of opposition. How numerous it was is problematical. It would seem that the extra-constitutional but nevertheless effective discrimination against tangible and visible property, now existing, could hardly be increased by providing for effective taxation of other forms of property.

Printed matter circulated by the Ohio Home Protective League which conducted an active campaign against the amendment, has come to hand and a sample document is reproduced to indicate the character of the arguments:

DANGER!
STOP! LOOK!
LISTEN!
YOU PAY THE TAX
IF YOU OWN A HOUSE OR RENT A HOME

The owners of mortgages, bonds, money, etc., want you to vote for classification of property in November.

DO YOU KNOW WHY?

Connecticut, Minnesota, Pennsylvania and Kentucky have "SUCCESSFUL" classification laws.

IN CONNECTICUT, mortgages, bonds, etc., pay $4.00 tax per $1,000.00, while HOMES pay as high as $37.50 on $1,000.00 tax valuation.

IN MINNESOTA, mortgages, bonds, etc., pay $3.00 per $1,000.00, while HOMES pay as high as $48.30 on $1,000.00 tax valuation.

IN KENTUCKY, money pays $1.00 per $1,000.00, mortgages, bonds, etc., pay $4.00 per $1,000.00, while HOMES pay as high as $31.00 on $1,000.00 tax valuation.

IN PENNSYLVANIA, mortgages, bonds, etc., pay $4.00 per $1,000.00, while HOMES pay as high as $56.50 per $1,000.00 tax valuation.

DO YOU WANT SUCH A SYSTEM OF TAXATION IN OHIO,

Do you want your HOME and the other property that cannot be hidden to bear ALL the local taxes and also to pay ALL the debts of your county, city and schools?

Do you want a tax law enacted to COAX mortgage-owners and bond-holders and money-lenders to pay the LOWEST rate of taxes, while HOME-OWNERS are FORCED to pay the HIGHEST rate?

Judge Wannamaker, of the Ohio Supreme Court, says of classification, "Necessarily, if some group of citizens pay less taxes, it follows that other groups must pay more taxes, else the revenues will be still further reduced."

Prof. Seligman, of Columbia University, the greatest tax expert in America, says, "Classification is but a make-shift, and is suited only to states that are very backward in industrial development."

Vic Donahey, Auditor of State of Ohio, says, "Classification of property for taxation without limitation of tax rates on real estate, means FREE TRADE in DEBT and TAXES. The way to encourage HOME-BUILDING and HOME-OWNING in Ohio is to vote 'NO' on the classification amendment this Fall."

LEGISLATIVE AND NEWS NOTES

At the annual meeting of the American Economic Association, held in Chicago December 29-31, the topic "Should the Excess Profits Tax be Retained as a Permanent Part of our Tax System" was discussed by Professors R. M. Haig, T. S. Adams and David Friday and by George E. Holmes and Thomas E. Lyons, all members of this association.

RHODE ISLAND TAX OFFICIALS' ASSOCIATION

The Rhode Island Tax Officials' Association at its eighth annual meeting held at the State House, Providence, on December 17th, was addressed by John M. Avery, Commissioner of Taxes of Vermont, on the listing of farm property. The new law providing for a uniform date for the assessment of local taxes in Rhode Island, which goes into effect in 1921, occupied the chief attention of the meeting. Governor Beeckman, in welcoming the members, advocated supervisory and equalizing powers for the State Board of Tax Commissioners, which at present acts only in an advisory capacity in the matter of local

assessments. A legislative committee was created to devise a means for making automobile registrations more accessible to local assessors, and for funding soldiers' bonuses. President Levi S. Winchester of East Providence and Secretary Edward P. Tobie of Providence, with other officers, were re-elected for the ensuing year.

NEW ENGLAND TAX CONFERENCE

The New England Tax Officials' Association held its eighth annual Conference at the State House, Boston, December 4th and 5th, with all the New England States and New York and Maryland represented. Recent tax legislation in New England was outlined, with the new franchise corporation income tax law of Massachusetts and the uniform assessment date act of Rhode Island as conspicuous features. New York's individual income tax law was explained in detail by Mr. Charles R. Hall of the state comptroller's office. Considerable attention was given to the administration of federal tax laws and exemptions thereunder. Chairman Zenas W. Bliss of the Rhode Island board of tax commissioners, one of the receivers of the Rhode Island traction system, discussed the cost problems of traction systems and their solution. Charles A. Plumley, former commissioner of taxes of Vermont and president of the Association, who has recently located in Ohio, outlined the causes for the failure of the Ohio classification amendment last fall.

A resolution favoring an income tax for all the New England States was offered and fully discussed, and it was decided to defer definite action on this question until a future meeting. Resolutions were adopted opposing further exemptions from taxation, and favoring the publication of future proceedings of the Conference.

The Conference also discussed the introduction of a course in fundamental economics into the common-school curricula, and instructed the executive committee to consult with the heads of educational institutions in New England regarding this matter.

Officers elected for the ensuing year were: President, John T. Amey of New Hampshire; Vice-President, Charles W. Cramer of Connecticut; Secretary, Edward P. Tobie of Rhode Island; Executive Committee, John J. Dearborn of Maine, John M. Avery of Vermont, Irving L. Shaw of Massachusetts, and Frank F. Davis of Rhode Island.

NEW HAMPSHIRE ASSESSORS' ASSOCIATION

The ninth annual meeting of the Association of New Hampshire Assessors was held December 17th and 18th at the City Hall, Manchester, N. H.

The papers were naturally largely of local interest, although one by Professor Richardson of Dartmouth College on "Problems in Municipal and Local Government" and one by Fred D. Rogers, Master of the state Grange, on "Problems of Taxation" may be mentioned as of more general interest. The latter announced the wholesome proposition that "any able-bodied man who is able to work 54 hours per week and refuses, shall pay a luxury tax on the idle hours. This would be as just and fair as to tax any other luxury as 'free indulgence in anything costly', and hours of labor are now so costly that, if wasted, they should be considered a luxury, and therefore should be taxed."

Judge Fellows suggests that this proposition ought to be widely spread. He writes that the conference was attended by some 400 town officials and that each of the 235 towns in the state was represented; that the thermometer was from 12 degrees to 25 degrees below zero outside the hall and inside up to the century mark. W. P. Farmer of Manchester is secretary of the association.

From Chairman Jones of the **South Carolina** commission we learn that the commission has recommended to the General Assembly, which meets in January, that an inheritance tax law be enacted.

During the past year the commission successfully equalized mercantile property throughout the state. Merchandise property has heretofore been assessed and equalized by the local authorities, gross inequalities existed and much merchandise escaped taxation entirely. It is the purpose of the commission during the ensuing year to assess and equalize saw-mills, bottling plants and other similar property which is inequitably assessed at present.

At the special session of the **North Dakota** legislature, held in November, the following changes in the tax laws were made:

Provision was made for semi-annual payment of taxes.

The income tax act of 1919 was amended removing the complicated and discriminatory feature of the tax on unearned incomes.

Bank deposits were exempted from taxation.

A gross earnings tax was placed upon freight line and car equipment companies.

An act was passed fixing the situs of personal property for taxation.

The money and credits tax acts of 1915, 1917 and 1919 were repealed.

Owing to the importance of the subject, some further detail may be given of the new **Massachusetts** corporation tax law, which was noted in the October BULLETIN. We quote from an address by Charles A. Andrews at the recent conference of the Associated Industries of Massachusetts:

"The new tax law of Massachusetts which becomes operative in 1920 provides for the same kind of taxation for domestic corporations and such foreign corporations as operate in whole or in part in this state. The old corporate franchise tax law applying to Massachusetts corporations is repealed, as is also the law levying an excise of 1/50 of 1 per cent of the authorized capital stock upon foreign corporations. Hereafter also the merchandise of foreign corporations will be exempt from taxation by the city or town in which it is situated.

"The new law applying alike to domestic and foreign corporations provides for a tax made up of two factors, as follows:

"First: A tax at the rate of $5. a thousand of the value of the 'corporate excess' of each corporation. The 'corporate excess' is found by the tax commissioner by determining the fair cash value of all the outstanding shares of the capital stock and subtracting therefrom.

"(a) Real estate and machinery at the value at which it is assessed by a city or town of Massachusetts.

"(b) Securities owned by the corporation the income of which would not be taxable if owned by an individual.

"(c) Real estate, machinery and merchandise belonging to the corporation but located outside of Massachusetts, and

"(d) Accounts and cash located outside of Massachusetts in the same proportion as property included under (c).

"Second: A tax of 2⅕ per cent of so much of the net income of the corporation as results from its business carried on in this state. In the main, the net income is the income reported by the corporation to the Government.

"One-sixth of the tax paid by each corporation is to be retained by the state, and the balance is to be distributed to the cities and towns where the corporation owns property.

"It is believed that this new law with a combination of two taxes will eliminate many of the inequalities which have existed under the old laws and will more nearly than heretofore tax all corporations alike. It is a great improvement over the conditions which have existed for many years and it is believed that when we become familiar with its provisions and administrations, it will be approved by most corporation officials."

The following account of the work of the state board of equalization of **Utah**, in connection with the assessment of coal mines, is furnished by Mr. Wm. W. Beatty of Salt Lake City at the suggestion of Secretary Bailey of the board, either of whom offer to explain further details upon request:—

To make effective the constitutional amendment approved by the electors of the state of Utah at the last election, a law was passed by the legislature making it necessary to assess all hydro-carbon and other non-metalliferous mines at their actual value. After an exhaustive survey and investigation by the state board of equalization and its experts, the following plan of assessing coal lands, both operative and non-operative, has been adopted.

Royalties are now being paid in the state ranging from 6½ cents to 25 cents per ton, the average being about 10 cents, and this has been taken by the board as a basis of determining the value of coal yet unmined, the coal content to be computed on the basis of one thousand tons to the acre foot. The lands are divided into four classes:

Class "A", those not exceeding 640 acres in any one assessment, which have transportation facilities and which are now being operated.

Class "B", those accessible from present railroad facilities but not to exceed 5 miles therefrom.

Class "C", those situated not less than 5 nor more than 10 miles from railroad facilities.

Class "D", those situated more than 10 miles from railroad.

From the basic value of 10 cents per ton, an allowance of 5 cents per ton for mining investment contingencies, which include developmental costs, geological risks, etc., is made on all classes.

On class "A" an additional 1 per cent per ton; class "B" an additional 2 cents per ton; class "C" an additional 3 cents per ton, and class "D" an additional 4 cents per ton is allowed for interest and taxes, it being assumed that class "B" lands will be operative within 6 years; class "C" lands within 13.5 years and class "D" within 27 years. This leaves a net maximum assessment of 4 cents per ton on class "A", 3 cents on class "B", 2 cents on class "C" and 1 cent on class "D" lands. The maximum value is to apply only to coal seams over 6 feet in thickness. Seams 5 to 6 feet take a lower value and seams 4 to 5 feet in class "A" a still lower value, but no assessment is to be made on coal in seams less than 4 feet in thickness except where the same are being operated. This will make an assessment of coal lands ranging from $1,280.00 per acre on the best property which has two 16-foot veins, to approximately $20.00 per acre on the poorest of the class "D" lands. This assessment is in addition to that which will be made on machinery, improvements or any additional value the surface of the land may have.

The recent activities of the **Minnesota** tax commission with respect to mine taxes are thus described by Secretary Ives:—

The 1919 assessed value of all land in Minnesota containing merchantable iron ore is $282,109,811 as compared with $295,102,890 in 1918. The decrease is $12,992,079.

Iron ore is assessed for taxation purposes at one-half of full value in accordance with the provisions of the classified assessment law. Other property is assessed at from 25 to 40 per cent of full value according to class.

In 1918 the number of tons of merchantable iron ore in the ground reported for taxation was 1,430,711,297, the 1919 figures are 1,394,923,451, a decrease of 35,787,846 tons. This is the largest loss in tonnage reported for any year since 1907.

The decrease in merchantable tonnage reported, as well as in valuation, has been due to the fact that little exploring for new ore was done during the year ending May 1 last, the date of assessment. Only 7,900,000 tons of new ore were found during this period while the shipments from Minnesota aggregated 45,000,000 tons.

In addition to the merchantable tonnage measured by the tax commission there are approximately 175,000,000 tons of iron ore of record in the tax commission's office, the grade and character of which are such that present market standards and conditions make it non-merchantable. At some future time this ore may have a market value.

The 1919 assessment of ore in the ground by counties follows:

	Tons	*Valuation*
St. Louis	1,180,822,166	$258,663,231
Itasca	155,195,645	18,942,319
Lake	77,000	39,750
Crow Wing	58,828,640	4,464,511
	1,394,923,451	$282,109,811

The valuation figures include assessments for structures and improvements on mineral lands and a nominal assessment for the surface, totaling $1,490,064.

Iron ore in stock pile at the mines, that is, mined iron ore, is assessed as personal property, also at 50 per cent of full value. The amount on hand May 1 varies considerably from year to year due to shipping and market conditions. This year 4,912,403 tons of mined iron ore were reported and the assessed value is $6,827,419. Last year 7,025,787 tons were reported and the assessment was $8,237,586.

The assessed valuation and tonnages for 1919 by ranges for both mined and unmined ore and the structures and improvements on mineral lands, as compared to 1918, follows:

Ranges	1918 Tons	Assessed Value
Mesabi	1,362,275,871	$288,288,533
Vermilion	12,252,625	6,877,204
Cuyuna	63,208,588	8,174,739
Total	1,437,737,084	$303,340,476

Ranges	1919 Tons	Assessed Value
Mesabi	1,328,950,614	$277,387,410
Vermilion	11,491,797	6,564,404
Cuyuna	59,393,443	4,085,410
Total	1,399,835,854	$288,037,230

In 1906, the year before the tax commission was created, the total assessed value of all mineral properties was $64,486,409. No tonnage records are available. The first assessment equalized by the tax commission in 1907 revealed 1,191,969,757 tons and the assessed value was placed at $191,706,682. Since that date, approximately 420,000,000 tons of iron ore have been shipped from Minnesota. Despite this large depletion the 1919 record of merchantable ore in the ground is 202,953,694 tons larger than that of 1907 and the assessed value is $97,233,693 greater, due to the development of new ore bodies and increased tonnages discovered in mines already operating.

The problem of equality of Taxation in **Texas** is thus expressed by a local observer:—

Probably no state in the union is more backward with regard to assuring equal and equitable taxation than Texas. Art. 8, Sec. 1 of the state constitution provides that "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." But no machinery has been created by the legislature to put this constitutional provision into practical effect. There is a uniform *rate* of state taxation but such diversity exists by reason of non-uniformity with respect to valuation, that the real intent of the constitutional provision is in effect nullified.

No legislation has been enacted creating a tax commission or state board of equalization with authority to equalize local assessments. In place thereof, there are hundreds of independent local assessment tribunals in the state, whose assessments are final except for appeal to the courts whose action is too slow and conservative to remedy the evils of inequalities of assessment.

The result is that the progressive communities in the state, such as Dallas, San Antonio, Galveston and El Paso, which have raised their assessments for local purposes, such as better roads and schools, have thereby penalized themselves as compared with less progressive, low-valuation localities, because the state tax rate is the same for each dollar of assessed valuation as determined by the local tax tribunals.

This inequality in the burden of state taxes has necessarily increased with the rise in the cost of state government during the last few years, particularly so in Texas because of its numerous independent state bureaus and the lack of a good budget system. It is very probable that the state expenditures will continue to increase, as there is distinct need for more educational institutions and insane asylums in Texas and for the expansion of the work of various state departments. Considerable retrenchment could be effected through the elimination of superfluous state employes, but should be accompanied by salary increases for those that remain, which would increase efficiency but offset the saving due to reduction in the personnel. For example, the salaries, particularly of the state officials, are disgracefully low for a large state such as Texas. The Governor receives $4,000 per annum, the Treasurer $2,000, and the salaries of the other officials are in proportion.

The present and prospective situation have therefore induced considerable agitation in some of the higher assessed localities for reform tax legislation. The reform movement aims at centralized equalization as a minimum. It has been and will continue to be opposed by those communities which have benefited at the expense of others through the present chaotic condition. The campaign to be waged will be for the creation of a central authority to compel every county to bear its fair share of state taxes. It will be directed principally toward the election in 1920 of legislators pledged to tax reform legislation.

There is some sentiment also for change

in the direction of more complete separation of the sources of state and local revenues. Former Comptroller Terrell is reported to be in favor of this plan. But the state government of Texas is extravagant enough already without a complete separation of state and local sources of revenue.

A proposed step in the direction of tax reform was suggested in a bill before the last legislature which failed to pass. It made special provision for the taxation of the intangible assets and properties of oil refining, packing house and various public service corporations doing business in Texas with annual gross receipts in excess of $100,000 and crude-petroleum-producing companies with gross receipts in excess of $50,000. The bill also provided for a state tax board of three, to consist of the comptroller, the secretary of state and a state tax commissioner, ex-officio President of the board, to be appointed by the Governor, and a limited number of subordinates. Each company coming within the provisions of the law was to be required to make an annual report to the board which was to determine the value of the intangibles within the state upon the basis of the true value of the capital liabilities, i. e. stocks and bonds applicable to property within the state, after deducting therefrom the true value of owned tangible property within the state, unless evidence or information before the board made it appear unjust to do so. The board was to have authority to use other methods if facts supporting a different assessment were presented.

The value of the intangibles so determined was to be apportioned by the board among the various counties. For public service corporations such as railroads, telegraphs, telephones and pipe lines, the apportionment was to be made upon the basis of the line or lines in each county.

This assessment of intangible property was to be the basis of an advalorem tax to be paid both to the state and the various counties by the assessed companies. Such assessment was to be added without review by the local authorities, to the value of the tangible property determined by them, and taxed at the same rates of tax. It was to take the place of all other taxes upon the intangibles and gross receipts of the corporations coming within the terms of this bill.

The board was also to be given the duty and power to obtain any information to aid in securing compliance with any present or future state revenue act; to study the tax systems of other states and make recommendations for further tax legislation in Texas; to report to the legislature upon the state revenues; to consult with and advise the Governor with regard to tax matters, and render an annual report to him.

On account of a deficiency in the state revenues and because of the necessity for tax reform, the bill contained an emergency provision, but nevertheless failed to pass. It would have meant a step in the right direction if properly administered. Even though this measure failed, it is to be hoped that the reform now being urged will eventuate ultimately in rescuing Texas from the chaotic condition with respect to taxation with which the state now labors. It remains for the legislature to exercise its function of providing a system of just tax legislation as imposed upon that body by the state constitution.

MUNICIPAL BONDS

An address delivered by Wm. Henry Hoyt, of New York, at the 14th annual convention of the League of Virginia Municipalities, in Danville, Va., on September 23, 1919

It has often occurred to me that if some of the remarkable efforts made in recent years to improve the form of government of our municipalities had been directed to the making known and prescribing of sound municipal administrative methods, we would have seen a greater increase in the practical efficiency of municipal government. I do not mean to suggest that these efforts have not been justified by the results, for it is undeniable that the recent structural changes in municipal organization by the adoption of the commission form of government, the city manager plan,

and otherwise, have tended to make municipal practice conform to municipal science. My point is that due recognition has not been given to the importance of efforts to attain this end more directly by legislation requiring certain principles and methods to be observed, especially in conducting the financial affairs of municipalities.

We cannot, of course, hope to make municipal officials wise or honest by legal machinery. As the governor of Pennsylvania said the other day in speaking of the proposed new city charter for Philadelphia, a charter direct from heaven will not bring good government unless the people elect the right kind of men to office. Moreover, charter provisions designed to prevent bad men from doing bad things sometimes prevent good men from doing good things. On the other hand, a good charter furnishes an opportunity and a guide for good government, and restrictive provisions may generally be so drawn as to prevent abuses of power and at the same time permit efficient use of power. The real problem is to avoid unnecessary rigidity or particularity in laying down rules and prescribing methods of procedure.

There are certain general principles and methods of financial administration which all cities should adopt and which, I believe, should be embodied in a general administrative code for all cities in the state. I wish to call your attention to the provisions which such a code should contain in regard to the issuance and payment of municipal bonds.

Of all the powers generally conferred by law on a municipal corporation, none is more likely to be misused than the power to raise money by issuing bonds payable in the distant future. For example, municipal officials often have a propensity for keeping down the tax rate while they are in office by issuing long-term bonds for current expenses; and taxpayers of the present are often quite willing to shift their burdens to taxpayers of the future. The serious consequences of such abuses are obvious. The courts therefore generally hold that the power to issue bonds is not to be implied, but must rest upon an express grant by the legislature; and the legislature generally safeguards the exercise of the power by numerous restrictions. Sometimes these restrictions fail to deal with fundamental matters. Sometimes they are unnecessarily restrictive. Sometimes they are so complicated or couched in such uncertain terms that great difficulties arise in determining whether the law has been complied with.

The general municipal administrative code to which I refer should, in my opinion, permit the issuance of bonds for the purpose of financing any capital expenditure which the city is authorized by law to make, and should permit the borrowing of money in anticipation of the sale of the bonds, provided the bonds have first been authorized by appropriate proceedings of the city. Many years ago, as a result of reckless issuing of bonds by states and municipalities in this country for aiding railroad and canal companies, the view prevailed in some quarters that bonds were not legitimate instruments for financing the needs of local governments, and should be prohibited. One of the few surviving reminders of this idea is a provision in the constitution of Arkansas which prohibits municipal bond issues in that state. Another is the prohibition of municipal aid to private corporations, to be found in most of our state constitutions. Today, the opinion is practically unanimous that the power to issue bonds for municipal purposes is absolutely necessary.

Although I favor a broad grant of power to issue bonds for all capital expenditures, that is to say, for public improvements having a period of usefulness extending into future years, because the future will derive benefits from the improvements and therefore may fairly be charged with a part of the cost, I believe that as a general rule the power should be exercised only in the case of extraordinary expenditures, and not in the case of annually recurring expenditures of regular amounts, even though they are permanent improvements such as street paving, sewers, school buildings, etc. For example, if a city spends $25,000 every year for school buildings, and raises the money by an issue of long-term bonds, the time may arrive when the interest and sinking fund charges will amount to more than $25,000 per annum, and it would be a good deal cheaper to finance the improvements by current taxes. This is the situation in New York City today, and it is largely responsible for the "pay-as-you-go" policy adopted in 1914 pursuant to an agreement with the

bankers of the city. But New York found it necessary to modify the policy. Elsewhere, I think, this very interesting problem should be left to the judgment of the city officials.

The general law I suggest should, in the second place, limit the life or term of a bond issue to the probable period of usefulness of the improvement for which the bonds are issued, such a period to be determined by the local authorities, but to be within certain maximum periods to be prescribed by the act for particular classes of improvements. There is a very large amount of outstanding municipal debt incurred for improvements whose usefulness is past and gone. In principle, this is the same as issuing bonds for current expenses. There was a time, it was said, when New York did such things as issuing 50-year bonds to put manure in the parks. Today 40-year bonds for 10-year roads are common. Bonds for roads should never run so long as 40 years.

Owing to the difficulties of determining the probable period of usefulness of any given improvement, difficulties will arise in the application of the principle that the life of the bonds should not exceed the life of the improvement. But engineers are able to make a much more accurate estimate of the period of usefulness than might be supposed. Of course the period may depend upon such factors as the amount of traffic on a certain street, in the case of street paving, and upon other circumstances peculiar to the particular case, and for that reason it is impossible to determine the period by an act of the legislature which does not deal with particular cases. On the other hand, if the statute does not at least fix a maximum period, municipal officials may abuse their powers. The Massachusetts municipal indebtedness act of 1913, which, when it was enacted, was generally regarded as the best municipal bond act in the United States, enumerates various classes of improvements for which bonds may be issued and prescribes the maximum term for which bonds for each class may run. The periods are unusually short, and are well within what anyone would consider to be the probable period of usefulness of the improvement. The New Jersey bond act of 1916 and the North Carolina Municipal Finance act of 1917 also contain schedules fixing the maximum term of the bonds for each class of improvement. In these acts the classification of improvements is very minute. For example, several different kinds of street paving material are mentioned, and a different period is assigned to each kind. Those acts further require as a part of the procedure for issuing bonds that the governing body of the municipality shall determine and declare what in its judgment is the probable period of usefulness, and the bonds must mature within the period so declared, as well as within the maximum period shown by the schedule in the statute. The New Jersey act permits the governing body to leave this question of the probable period of usefulness to the municipal engineer. The Norfolk charter of 1918, which, with the three other statutes I have mentioned, is perhaps the most carefully drawn legislation in this country regulating municipal bond issues, requires the determination to be made by the city engineer. In other respects Norfolk follows the New Jersey and North Carolina plan. In England the central administrative body known as the local government board makes the determination of the probable period of usefulness. The English practice, and also the New Jersey and North Carolina statutes and the Norfolk charter, permit a single issue of bonds for several different improvements having different periods of usefulness. In such cases, the average of the different periods is ascertained, taking into consideration the amount of bonds to be issued for each different kind of improvement, and the bonds are required to mature within such average period. If, for example, it is proposed to issue $150,000 of bonds, of which $50,000 are for 10 years street paving and $100,000 for 40-year parks, the average period would be 30 years, ascertained as follows:

Years	Amount	
10	50	500
40	100	4000
	150	)4500(30

In my opinion the general law should, in the third place, require all municipal bond issues to mature in annual series or instalments, and should abolish the sinking-fund system for future bond issues. The cost to the community of issuing serial bonds is exactly the same as the cost of

issuing so-called "straight" or "sinking" fund bonds, maturing all at one time, provided the sinking fund earns interest at the same rate that the bonds bear. But in point of fact municipal sinking funds are not usually maintained as they should be, and it has seemed to be impossible to prevent mismanagement and losses of such funds. Again and again the absence or insufficiency of the sinking fund makes it necessary to refund the bonds at maturity and to postpone the payment of the debt to a date long after the expiration of the life of the improvement for which it was incurred. Bond dealers and investors now understand serial bonds and look upon them with favor. It is noteworthy that Massachusetts, New Jersey and North Carolina require all city bonds to be issued on the serial plan.

In the fourth place, the administrative code should not only insure the final payment of new bond issues at maturity by requiring serial payments, but should provide a definite plan for establishing and maintaining sinking funds for old "straight" bonds. This could be done, as it is done in New Jersey, by placing municipal sinking funds in the hands of a local sinking-fund commission independent of the local authorities, by creating a new state officer to supervise the maintenance and administration of sinking funds, and by requiring municipalities to make certain annual contributions to their sinking funds. It would be impracticable in many cases to make good the present deficits in sinking funds, due to mismanagement and losses in the past. The tax burden would be too heavy, and refunding must be allowed to some extent. But there is no reason why the annual sinking-fund contribution should not be at least equal to the amount which, if contributed annually from the original date of issue of the bonds to the date of maturity, would amortize the bonds, assuming that the sinking will earn 3½ or 4 per cent per annum, compounded annually.

The fifth main provision to be embodied in the proposed general law, unless it be embodied in the state constitution, should limit the aggregate amount of the city's bonds to some fixed percentage of the assessed valuation of taxable property in the city. Nearly all of our states prescribe debt limits of this kind. They are intended to safeguard taxpayers against unduly burdensome taxes, and in many instances they have proved to be very effective. Before such limits were devised, there were municipalities which piled up debts of such great magnitude that more or less successful attempts were made to escape payment, by means of compromise with creditors, repeal of charters, resignation of officials, and otherwise. The cases of Watertown in Wisconsin, several counties in Missouri, Elizabeth and Rahway in New Jersey, Memphis in Tennessee, and Mobile in Alabama, are notable examples. But it must be conceded that limitations of the amount of public debt by reference to the assessed value of taxable property are, at best, arbitrary and clumsy expedients. In theory, there is no such thing as a fixed or absolute limit to the amount of debt a municipality may incur, and no such thing as an absolute maximum ratio of a municipal debt to property values. Hence those debt limitations sometimes operate to prevent the making of public improvements which ought to be made. The difficulties of fixing an arbitrary legal limit are shown by the great differences in the limits prescribed by the different states. Moreover, the assessed value of taxable property is an unsatisfactory basis for a debt limit, because it may be, and at times has been, increased merely for the purpose of expanding the debt limit, and because the ratio of assessed value to actual value differs in different taxing districts. On the other hand, inasmuch as these debt limitations have the merit of being effective when the limit is not too high, and no other expedient has yet be shown to be equally satisfactory, it is generally held that they should be continued. Some day we may be able to deal with the matter in more scientific fashion by establishing central administrative bodies with powers like the local government board of England, including the power to pass upon the expediency of municipal bond issues, but up to the present this has been deemed impracticable here. In my opinion a 10 per cent debt limit, that is to say, a limitation of debt to 10 per cent of the taxable values, with a provision exempting bonds for self-sustaining municipal enterprises, is very liberal. I believe that the 18 per cent limit in the Virginia constitution would be too high were it not for the fact that it is very difficult to exclude bonds for self-sustaining enterprises

from the operation of the limit. I am also inclined to the view that the debt limit should be a territorial limit and not merely a limit upon the debt which any one political subdivision within a given territory may incur. Under the ordinary debt limitation, any number of political subdivisions may occupy the same territory, and each may incur debt up to the limit. South Carolina furnishes an interesting exception. There they have an 8 per cent limit for a city and a 15 per cent limit for the territory embracing the city.

The sixth provision which I would put in the general law for Virginia municipalities would be one making all municipal bonds direct and general obligations of the municipality and payable out of taxes levied upon all taxable property in the municipality, without regard to any tax limit prescribed by law. Limit the power to incur debt, but not the power to pay debt. Every limitation of the power to pay will be reflected in the market price of the bonds, and municipalities will find it cheaper in the end to secure the payment of their bonds by the pledge of a sufficient tax, even though it is proposed to use special funds other than general taxes to pay them.

Constitutional and statutory provisions frequently limit the rate of all taxes to a certain percentage of the assessed valuation of taxable property in the taxing district, or to a certain percentage of the amount of taxes levied in a previous year. These tax limits are designed to accomplish the same general purposes as the debt limits to which I have referred, and they are open to the same objections. In this connection it is interesting at this day to read the criticisms made in 1877 by a commission appointed in New York to devise a plan for the government of cities in that state. The report of the commission says: "Hopeless of finding any other method of arresting the increase of debt and taxation of cities, some have proposed that the increase of debt beyond a certain prescribed amount should be absolutely prohibited and taxation limited to a specified ratio. . . . Such restrictions do not attempt to prevent wastefulness or embezzlement of the public funds in any other way than by limiting the amount of the funds subject to depredation. The effect of such measures would simply be to leave the public necessities without adequate provision." A discussion of the expediency of limitations upon the amount of taxes levied for purposes other than the payment of municipal bonds would be outside the scope of this paper. I am advocating the abolition of tax limits only to the extent that they affect taxes to pay bonds. In support of that proposition I maintain, first, that the good to be derived from limitations of the power to levy taxes to pay bonds is outweighed by the harm they do to the credit of the municipality, and, second, that a better way to prevent oppressive taxation for the payment of bonds is to limit the amount of the bonds by means of a debt limit. The practical danger of such tax limits is illustrated by numerous cases in which the limit has rendered municipal bonds wholly or partially uncollectable. For example, Alabama has a constitutional tax limit from which taxes for the payment of bonds are not excepted. About 20 years ago the holders of bonds of the city of Birmingham settled their claims against the city for about 66 cents on the dollar, because the city could not pay the bonds owing to the tax limit. At the time the bonds were issued it was believed that the limit was sufficiently high to render them safe investments. The difficulty in selling new municipal bond issues when there is any tax limit which might affect the payment of the bonds is shown by the experience of numerous municipalities, especially in the south and west. Even in Ohio, although their so-called Smith one-per-cent tax-limit law attempts to reverse the usual rule that taxes for operating expenses shall have priority over taxes for the payment of debts, large and wealthy cities have found that bond dealers submitting bids for the purchase of city bonds make allowance for the possibility of trouble arising by reason of the tax limit. In Virginia, a lawyer passing upon the legality of county, city, town or school district bonds occasionally encounters one of these tax limits which affect taxes for bonds.

On the question whether the approval of the voters or taxpayers of a city should be required for the issuance of bonds there is a conflict of opinion. The South Carolina constitution requires a petition of a majority of the freeholders of the city and a vote of the people at an election as conditions

precedent to issuing bonds. On the other hand, in New York, at least in the larger communities, the city authorities are vested with complete power and authority. Between these two extremes is the Pennsylvania plan, which permits the city authorities to incur debt up to two per cent of the assessed valuation without a popular vote, but requires a vote on larger amounts. I am personally of the opinion that the assent of the voters for bond issues is rarely of much value. People do not ordinarily take much interest in bond elections, and those who do are usually as prone as the municipal officials to shift the tax burden to the future when public improvements are wanted. Sometimes the matter is viewed by the voters entirely from the standpoint of partisan politics. I think, on the whole, that a better plan is that embodied in the general bond acts of New Jersey and North Carolina, under which no election is necessary unless within a certain time after the passage and publication of a bond ordinance a certain percentage of the voters file a petition for a referendum.

These are the fundamental propositions relating to municipal bonds which I believe should be embodied in a general administrative code for all Virginia cities. The act should also provide, among other things, for the control of expenditures for current expenses by means of an annual budget, and should carefully regulate the borrowing of money in anticipation of the collection of current taxes. We are all familiar with the practice of bequeathing a floating debt for current expenses to succeeding city administrations until the debt becomes so large that it is impracticable to retire it by means of taxes in any one year, and nothing can be done except to fund it by a bond issue.

Nearly all of the provisions to which I have referred have been embodied in the Massachusetts municipal indebtedness act of 1915, the New Jersey general bond act of 1916 and the North Carolina municipal finance act of 1917. There is no similar statute in Virginia, except the Norfolk charter of 1918, which, of course, is limited in its operation to one particular city.

I hope that the league of Virginia municipalities will bring about the passage of a law such as I have described. Besides its other advantages, such a law would greatly assist municipal officials in issuing bonds, make the bonds more attractive to investors, and make it easier for the bonds to pass examination by bond lawyers.

FOREST TAXATION

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From the time when the possibility of handling forest lands to produce future crops of timber, instead of stripping and abandoning them, was first discussed in this country, two arguments have been advanced by forest owners as imposing insuperable obstacles to the undertaking of forestry; namely, fire and taxes. Lumbermen in Minnesota and elsewhere expressed themselves as desiring to maintain their forest lands in growing timber, but unfortunately such a policy required investments in holding land, young timber, etc., and there was no reasonable chance of realizing on this investment because of the certainty of destruction by fire, or confiscation by taxation. Therefore they were reluctantly compelled to strip the land bare and let it burn.

Foresters met this challenge by undertaking to provide fire laws and administration, and the time is approaching when the risk of destruction by fire will be brought under reasonable control—it never did present much of a problem in hardwood regions of farm woodlots.

At the same time the question of reform in forest taxation was taken up, but here very great obstacles were encountered, and up to the present time no general solution has been reached, nor are there any laws in operation which have become generally used or promise to meet the situation.

Yet if we are to grow forests on private lands, the "risk" of confiscatory taxation must be met or else it will continue to be cited as an obstacle which prevents the contemplation of forestry by land owners, much as they might desire to practice it.

Is the present system of taxation an

obstacle to the production of timber on forest lands? Or is the real reason for the failure to put these lands to such a use, the fact that the owners have no interest or are deterred by other, quite different, factors? The main reasons why lands are not devoted to growing trees are, that Americans as a class do not understand the business of forestry, its practice, its economic advantages or its necessity as a measure of general prosperity and public economy, and having in the main destroyed the forest capital by a mistaken policy of clean cutting, are loth to undertake the restoration of the business by the time-consuming process of tree planting and growth—so any obstacle looks big to them and taxation becomes a serious stumbling-block.

Is the general property tax a burden sufficient to prevent or discourage the undertaking of growing crops of timber? This is a very different problem from that presented by the annual tax on timber which is already mature and fit to cut. Annual taxes on standing mature timber tend to force cutting. But mature timber *ought* to be cut—if held for long periods it represents an economic waste. The community is deprived of the use of wood, incurs a loss of wages, industries dependent on wood suffer, and a form of capital which represents taxable wealth escapes its just burden of taxation. This is especially true since virgin timber has usually cost the owner nothing in the way of expense for production — it is not an artificially-grown crop—the only expense is fire protection, which is a form of insurance similar to that placed on any property, and taxes. The investment of capital in mature timber is often for speculative purposes with no thought of engaging in forest production. It is true that large timber operators often find it necessary, in order to insure a supply of raw material, to acquire a twenty-year supply of timber, the taxes on which may prove a large item of expense. When this supply is so great as to require fifty years to remove it, the holding can be considered largely as purely speculative, and not needed for the conduct of a normal operation, and it is not good public policy to relieve speculators of a just burden of taxation in order that they may realize expected profits from which the community gains no advantage. The tendency of taxation to force the cutting of timber is not *in itself* the evil to be met — this problem should have been solved in quite another way; namely, by retaining the ownership of these large timber reserves in public hands as was done with the National Forests.

Another reason for taxing mature timber is that the growth in virgin timber is negligible, being offset by decay and other natural losses, so that the productive capacity of the land is not put to its proper use but is stagnant.

A final reason for continuing to tax mature timber is the loss in public revenues which would result from exempting such property from taxation, and which would tend to defeat any effort to bring about such an exemption.

The arguments of owners of standing timber; namely, that taxation would prevent their utilizing the land after cutting, to produce new crops of timber, is *not* an argument for relief from proper or equitable taxation of timber already grown.

Is there, then, still a problem of taxation connected with timber? There is. The admitted fact that annual taxes on standing timber hastens the cutting and makes holding unprofitable, tending to increase the cost of lumber, acts with equal force to discourage the production of new crops. Owners and operators come to believe that if taxes on standing timber are a heavy burden, it would be a still greater burden on land devoted to forest production, when extended over the long period required to grow a crop. And they are right.

While necessary as a present-day measure of revenue production, on timber purchased as an investment, the principle of taxing property values instead of income creates this undue burden of taxation just so long as it is impossible to realize the income with which to meet this tax. This results from two factors — first, the total tax or sum of taxes paid on such non-productive property continually increases with the period of holding, which explains the difficulties of large speculative holdings. Second, it is not the same thing to pay out a given sum at the time the revenue is realized from this property and to pay this same total amount at periods anywhere from one to forty years in advance of this income. In the latter case mathe-

maticians compute the total equity at compound interest and for periods of 20 years or more, even the most reasonable rates of interest will give a total cost of from three to twenty times the actual cash outlay.

These facts are well known to investors and while the purchaser or owner of mature timber has the opportunity or choice of cutting, no such choice is presented to the owner of land and growing timber who, in order to get revenue, would have to go out of business; i. e., sell the land itself. It is, therefore, perfectly fair to state that unless a different system of taxation is applied *in the future* to property represented by growing timber, few will have the courage to attempt the undertaking or to cut their mature timber in a manner so as to secure reproduction by leaving a part of the stand, the younger trees, as an investment in forestry.

Accepting *past* and *present* conditions as a necessity does not mean that we can ignore future conditions. If we wish to continue to have timber it will be necessary to grow it. Nature unaided will not produce the goods. There is not time to discuss this at length, but the statement is based on wide and close observation of the conditions in which cut-over land is left after logging, with no thought for the future.

It is therefore the absolute duty of states to provide a different and equitable system of taxation for timber. This need has been almost universally recognized and nearly every eastern, northern and prairie state has legislation of some kind intended to encourage the growing and planting of trees. Yet up to this time not one of these laws has solved the problem nor do any existing laws even promise to accomplish the needed reform.

Why have these laws failed in practice? The answer in every case is, that they have sought to create special conditions or exceptions in the nature of privileges, to such owners of forest lands as agree to carry out special measures; i. e., practice forestry, and have never attempted to create correct conditions applicable to *all* timberland, without discrimination. To these special conditions have been tied numerous special requirements of procedure, or red tape, often accompanied by a burden of inspection, penalties for failure to comply, or regulations of methods of management. The cost of the proposed systems to the owner far exceeds the privileges granted, and the cost of administration by the state is too large in proportion to the benefit derived.

The initial mistake was to grant bounties, tax rebates, tax exemptions, or low fixed valuation of forest lands as a reward for planting or growing trees. The reasons for failure lie in the general system of assessment of taxes. Such lands seldom form more than a small portion of any taxable unit. Local assessors resent such exemptions, and nullify their effects by adjusting other assessed values so that there is no saving to the owner, who is put to the trouble of complying with additional formalities to secure a fictitious gain. The general underlying principle of such laws is wrong, for if we are seeking to correct an injustice or inequity in taxing timber, *all* such property is equally entitled to the benefits of this reform rather than to attempt to set up an elaborate system of separating sheep from goats, in which the goats, being numerically superior, will ultimately see that the special privileges are wiped out.

Private property is not usually taxed according to the intention of the owner as to its future use, or his actual method of handling it, but solely on the basis of the material values present Yet every law for forest tax reform has disregarded this fundamental fact, probably confusing the idea of possible public benefits with that of public ownership and use.

This error has created insuperable difficulties, of which a few may be cited.

1. The effort to fix and reduce the assessed value of forest land
   - a. Has required classification of land
     - 1′ on basis of intention of owner to practice forestry.
     - 2′ on basis of suitability of the land for forestry.
     - 3′ on basis of the value of the land, to prevent misuse of the law by speculators to avoid taxation. (This factor has caused the vetoing of some such laws.)
   - b. Has at the same time threatened to so reduce local revenues that its final overthrow would follow its widespread application. It is self-defeating.

2. The effort to require the practice of forestry on such lands as a condition of receiving this privilege has required

a. The parceling of holdings into separate lots, with maps, descriptions and legal forms, special blanks, listings and assessments.
b. Compulsory expense for planting or other measures, not required of other forest owners.
c. Special provisions for penalties in shape of back taxes on withdrawals of lands from the special class.
d. Limitation of maximum areas to receive the supposed benefits of tax reform.
e. Special contracts to cover the obligations incurred by state and owner.
f. Cumbersome procedure in accounting and in payment of products taxes.
g. Cumbersome efforts to distinguish between age classes and land bearing mature timber versus plantations, which features are most difficult to administer as part of a tax system.
h. Burdensome requirements on state foresters in the line of inspection of small widely-scattered tracts to see that various phases of the law relation to valuation, practice and products tax are carried out, for which if the law were a success, these officials would have absolutely no time unless the staff were increased.

These laws *all* attempt to shift the burden of taxation, either to other land owners or, as in Pennsylvania, to the state, instead of applying a universal tax reform and permitting the operation of this reform to effect such improvement as other conditions render possible.

What we need is a plan which will not only remove the inequality of the present system, but which will remove it on timber as a class of property throughout the state, i. e., for *all* owners of timber. There are *three* requirements of such a law.

1. All forest economists are agreed that the value of timber should be separated from that of land for purposes of taxation, and that the timber should if possible be taxed in the form of a products tax when cut, in lieu of annual taxes.

2. It is now generally agreed that local revenue from taxation should be maintained, and the products tax substituted gradually.

3. While *not* so universally conceded, the writer holds that virgin timber should continue for the present, to bear an annual property tax and that the reform should apply to future, artificially-grown timber.

The law which comes nearest to satisfying these requirements is that of Massachusetts. This in turn was based on the Connecticut law.

The Connecticut law requires the valuation of standing merchantable timber separate from land—but it attempts to fix the value of land for fifty years and to limit the tax rate to 10 mills. Then to avoid speculation, it limits the value of such lands to $25.00 per acre. Standing timber is taxed annually until cut, but young timber will pay only a products tax.

Massachusetts was the first state to establish the principle that no effort should be made to fix or lower the assessed value of bare land or land separate from timber values. After separating the value of timber, the land is assessed at its fair value as bare land and pays annual taxes. This value may be adjusted when changing economic conditions make it necessary. This brings *all* land, of whatever character, value or location, under the operation of the law, provided only that the owner desires to take advantage of it. The merits of this autonomous or universal classification are

1. that it wipes out the necessity of classifying lands;
2. that it insures steady and continuous local revenues, and the possibility of adjustments of values;
3. that it does away with the false principle of special privilege in assessed values or rates of taxation.

The abandonment of the idea of limiting the power of assessors to raise land values is a hard point to concede for advocates of forest tax reform. But it is the first step towards any lasting progress, and must precede the educational movement which will be needed to secure equitable valuation of forest land, based on its value for growing timber. If assessors can so easily defeat the purpose of special privileges, they will continue to show a certain amount of unfairness in valuing lands belonging to different owners, — but it will be much easier to correct these inequalities when *all* owners of forest land are equally interested.

The second distinct gain which the Massachusetts law presents is in its plan for taxing standing timber. In effect this is to continue the annual tax on the present assessed value of this timber until it is cut or destroyed, but to arrange for the substitution of a products tax in place of this system, as soon as possible.

For this purpose, after the original separation of assessed value into land and timber, the value of the timber cannot thereafter be increased. But as fast as the timber is cut, and pays a products tax, this assessment is reduced. The basis of reduction is value, not quantity. The purpose is, to maintain the original total assessed value of the property, land and timber, thus maintaining the town revenue from annual taxes. The chief merit in the law is, that only the original assessed value of timber pays this annual tax. Growth in value, or growth in volume, is not so taxed. *Value* of the timber cut is the basis of wiping out this value of standing timber. So that if any such increase in value or growth occurs, it is not necessary to cut all of the timber in order to do away for the future with the system of annual taxes on the timber.

Since all increases in assessed valuation of *timber* are prohibited, the owner of timber who manages it to secure growth, or who leaves young trees or a part of the stand for forest investments, and the owner of land who plants it, or of immature timber who protects it, is assured of relief from all annual taxes on standing timber *for the future*. He does not pay these taxes on *any* timber except the present value of his present mature stock, on which, as we have seen, he should probably pay in any case. By paying on this value, the town revenues are absolutely protected for the present and near future. It is an equitable arrangement for the taxpayer and for the community.

The third provision of the Massachusetts law is the products tax, imposed on timber at the time of cutting. In this law the payment of this tax is the means of securing the reduction and final abatement of the annual tax on standing timber. This would appear to threaten double taxation. But in effect, this danger is done away with by fixing the amount of the tax. This law increases the tax 1% by five-year periods up to a maximum of 6% on the value of the timber on the stump at time of cutting.

The justification of imposing a products tax on timber which has been paying annual taxes lies in this—that the owner has, under the law, been protected from increased assessed value on his standing timber, and can therefore predict what his taxes on this timber will be, and that actual increase in either value or volume, or both, is sure to occur, which will not be taxed annually.

The real purpose of imposing the products tax is to substitute this tax eventually for that on standing timber and to avoid the impossible condition of imposing one kind of tax on a part of the timber cut in a region and another kind on the remainder. Young timber which has never paid an annual tax must pay a products tax when cut. It is impossible to separate this timber, physically, from timber which has borne the annual tax. But it is a very simple thing to keep account of the original assessed value of standing timber and wipe out this value on the payment of products taxes from *any* timber grown on the owner's property. When this process is completed, the substitute of the products tax for annual taxation is complete for that property.

This Massachusetts law failed, as did its predecessors, not because these principles were unsound, but because it still retained the principles of classification, and of special requirements to practice forestry by stocking the land with timber together with the need for special listing and records. Less than 60 owners have availed themselves of it in five years. Even this is a good showing.

If we can accept these principles as established, there then remains one feature to make a practicable law—universal application and simplicity of procedure—the abandonment of special classification for timber as well as for land and the establishment of the principle of taxing timber as such, and not the owner's intentions. This means doing away with the *impractical* features of the law, namely the special classification of lands and their registration, the requirements regarding planting, etc., and inspection by state officials. But does this leave any forestry?

The answer is that forestry will never be crammed down an owner's throat by a

tax law. Given a square deal in taxation, the owner is free to choose what use his land is to be put to, and the *handicap* against forestry is removed. This should be the purpose of the law rather than a thinly disguised attempt to cajol occasional individuals into placing themselves under state control.

This leaves a clear field for educational forces in forestry or even for measures of necessary regulation, to apply to *all alike*.

Can a law be framed which can be applied to all land owners within a reasonable period? I believe it can if we do not require impossibilities. To accomplish this we must depend on the existing local machinery and make its requirements such that they can be met by land owners and so that it will be to their advantage to do so. The plan proposed is as follows:

1. Establish by law the principle that after passage of the law, all lands when re-assessed for taxation must have the value of standing timber separated from that of land.

2. Provide that the value of standing timber when so determined, shall not at any time thereafter be re-assessed or increased.

3. That the value of land, separate from that of standing mature timber, shall be that of similar wild or unimproved land in the vicinity and that the value, if any, of immature or young timber shall not be considered in assessing the value of such land, but that land bearing such young timber shall be assessed the same as wild unimproved bare land of similar quality.

4. That at any time within five years of passage of the act, any owner of land bearing mature timber may declare the value of that timber, and that thereupon the proper officials shall separate the assessed value of the property belonging to the said owner, into two parts, the sum of which shall equal the former assessed value of the property. The value of the timber shall be entered in a separate record for purposes of future taxation, and shall be assessed annually at current rates but shall not thereafter be re-assessed or increased. The remaining value shall be the assessed value of land and other property, and shall be assessed as before, so that the sum of assessed values shall remain the same on the total property, as if the separation had not been made, for a guaranteed period of at least three years.

5. That in consideration of declaration of value of timber, there shall be no re-valuation of the land for a period of three years thereafter, and that in consideration of the fact that whatever valuation is placed by the owner on the timber, the owner thus fixes the residual value of the land for taxation, and that the total value of the property is neither increased nor decreased, the assessors shall accept without review the value of said timber and not increase the same, since such action would either decrease the assessed value of the land or increase the value of the total property before the end of the period of three years agreed upon.

6. That at the expiration of three years from the date of declaring the value of the timber, or at any time thereafter, the value of the land may be re-assessed but that said assessed value shall not include the value of any timber whatever, young or mature, and shall not exceed the value of wild or unimproved lands of similar character in the vicinity.

7. That in the absence of a declaration of value of timber within the period of five years, the value of the property shall be assumed to be that of land bearing no timber of taxable value, until reassessed by assessors. But that before reassessing any land on which no timber values have been previously declared, the assessors shall ascertain whether there be any timber values on said land, and shall in every case separate said values for purposes of taxation.

8. That from date of passage of law, a products tax shall be assessed upon the stumpage value of all timber cut from the land except such timber products as are used on the land belonging to and assessed against the same owner or by the owner in the same town, for domestic use or for improvements having a taxable value. That this tax shall be 1% of the said value for the first ten years following the passage of the act, and shall increase 1% for each succeeding decade up to a maximum of 6%, provided that nothing in this section shall prevent the payment of a products tax on said exempted products for the purpose of obtaining a reduction of assessed valuation on said standing timber.

9. That the value of any timber stump-

age which has been declared by owner before the products tax was paid, or which has been fixed by assessors, in absence of said declaration by owner, shall be reduced for purposes of future annual taxation by the amount of the value of stumpage upon which said tax is paid, provided that said value of stumpage upon which said tax is paid must have reached a total of at least 5% of the original listed value of timber taxable in any one town assessed against said owner, before said reduction in assessed value becomes operative, and provided that when the value of said stumpage upon which the tax has been paid shall have equaled the original declared or assessed value of the timber listed by the owner, said annual taxes shall cease and thereafter any timber standing or growing upon said lands shall be relieved of annual taxes and shall pay only the stumpage tax on the products when cut.

10. That an account shall be opened with each owner of land having standing timber whose value has been assessed for taxation, on which shall be entered, the assessed value of standing timber, and the *value* of the stumpage upon which a *products tax* is paid, and the rate and amount of the tax. Whenever said value shall equal 5% of the assessed value of the timber, a reduction shall be made in said assessed value equal to value upon which tax has been paid, and the annual taxes shall thereafter be assessed against said reduced value.

The purpose of these provisions is self-evident. They are to secure a complete or universal adoption of the law within a reasonable time and with minimum cost and effort and least injustice.

It is made an object to timber owners to list the timber values, as by doing so they secure a fixed value on this portion of their property and protection from increase in total assessment for three years; i. e., from any action on part of assessors to nullify the effect of listing timber values by simply adding said values to value of the property. They also secure a definite procedure by which said values can be extinguished by payment of products tax. It is to their interest to declare full values, since this is the only portion of their assessed value which can subsequently be so extinguished. Failure to declare value, or declaration of too low a value, permits and justifies the continuation of correspondingly high values on bare land on which taxes will be continued. Failure to declare *any* value permits the assessors to determine new value at any future time, both for land and timber, while declaration of timber values confines them to revaluation of the land without timber, on the assumption that existing values having been the basis of taxation when the law was passed, shall equitably remain the basis of taxation of the timber.

The public interests, on the other hand, as represented by the assessors, are thoroughly protected. The total assessed value is in no case reduced. After three years, the value of the land can, if inequitable, be reassessed, and within the requirements of the statute, be further adjusted. The loss of annual taxes does not occur unless timber is cut, when they should in any case cease, and the increasing value of young timber and old stands is taxed by a products tax.

Failure to declare and pay the products tax on old timber carries its own punishment in that the timber, although cut, will continue to be assessed and taxed annualy. By the time the products tax on young timber assumes large proportions, the machinery for securing its collection would be in good working order.

Owners of wild, unimproved or cut-over lands, under this system, will pay on the same assessed valuation as those who have left seed trees, young timber and have planted or secured natural reproduction. Although the latter property will constantly increase in value as the result of forestry, there will be no increase in taxation which is not imposed equally upon unimproved wild lands. Yet these forested lands will eventually bring in the additional revenue of products taxes, besides furnishing employment and raw material for the wood-using industries.

Unless the public is willing to agree in advance to such a plan of taxation for timber, no such inducement or guarantee is offered for proper management; instead the owner of young timber may be certain that the assessor will raise the value of such lands because of his industry, long before the trees can be cut, and by the time he can sell his crop, taxes and interest will have absorbed far too great a part of his expected income.

Only by the universal substitution of a system of taxing timber when it is cut for the present method of annual taxation of timber, can we hope to make possible the practice of growing timber by private owners in the future — and by the above plan this can be brought about in a reasonable time and with justice both to the owners and to the communities.

TAXATION OF BANKING INSTITUTIONS

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Probably no phase of federal or state activity is commanding more attention at this time than that part relating to taxation. Increases have been enormous, and application more diversified than ever before. Practically every activity and every source of income are taxed.

Never again shall we revert to pre-war conditions as applied to taxation. The income tax will be permanent, as will be various other forms that the war's demands have created, though, of course, these will be modified as conditions warrant. We expect this, but we also are entitled to exect a just and fair application of the taxing principle as applied to different classes of property.

Banks and trust companies can only conduct business under national and state permission and regulation. The Federal Reserve Bank law has also added restrictions. The activity of financial institutions during the war loan drives, their patriotic response to all demands, prove their unselfish loyalty. Their needs and requests are entitled to consideration.

Where conditions are similar, there should be uniform laws governing the taxation of banks and trust companies. A careful review of the laws of various states indicates that some states seem to appreciate the situation and have passed favorable and equitable laws. Other states, owing to inflexible constitutional limitations, burden these institutions grievously indeed. The regulations governing national banks are uniform throughout the various states, as are those governing the activities of trust and savings companies. The requirements and restrictions differ but to slight extent. Why should such variations in taxation methods continue?

A careful inspection of the laws of different states discloses such various methods of taxation as can certainly warrant the demand for more uniformity if possible, and an effort upon the part of the banking associations to secure uniform and just laws throughout the United States governing the taxation of banking institutions.

Certain states have the general property tax, and their constitutional limitations are such that they can receive no relief. The general property tax, under which all property is taxed alike without regard to the fundamental principles of a just taxing law, such as the "ability to pay" and the "benefits derived", is so universally condemned and is found to be so unfair and ineffective that we need not discuss its shortcomings. Practically every state that is so burdened has labored to secure a change. But it is a difficult task, as has been proven by some states which have endeavored to affect a revision and secure a proper law for the taxation of property.

The ordinary method pursued under the general property tax, in the assessment of banking institutions, is to determine the value of the stock for assessment purposes by using the capital surplus and undivided profits as a basis and deducting from this the value of the real estate, which is assessed separately, the remaining amount being taxed as other property.

In the states of Indiana, Illinois, Ohio, Kansas, New Hampshire, Michigan, Colorado, Mississippi, Wisconsin, Iowa (which only allows a deduction for real estate holdings occupied by banking institutions), West Virginia, Nevada, New Mexico, North Dakota, South Dakota, Kentucky (which equalized the assessment of bank stocks with the assessment of other property in 1919 by taxing 85% of the value) and Georgia banks are assessed on the basis of the book value.

Other states have secured legislation

that has enabled them to break away from the general property tax, either by classification or income taxation, but the resultant taxation of banks is exceedingly various even under these conditions.

In New Jersey, bank and trust company stock is assessed at three-fourths of 1% of value. In Minnesota, the value of bank and trust company stock for taxation is determined by taking the capital surplus and undivided profits as a basis and deducting real-estate investments in Minnesota. The value of bank stock so determined is then assessed on a basis of 40% of this amount. In Maryland, the book value is used as the basis for taxation at a rate of 1%.

Bank values in North Carolina are determined by taking the book value as the basis, but permission to deduct investments in the United States, Federal Farm Loan and Joint Stock Land Bank bonds is given, such investments not to exceed 25% of capital and surplus. It is equivalent to exempting 25% of capital and surplus from taxation.

In Virginia, book value, less real estate, is the basis for assessment, but the total tax cannot exceed $1.43 for $100.00 of value.

In New York state, the book value of capital, surplus and undivided profits is taxed at 1%.

The state of Alabama assesses the value of capital stock at a "fair and reasonable" value, less assessment upon real estate, this being the basis for taxation, and for this purpose 60% of the value is the taxable value.

Arizona determines the value for assessment by estimating the earnings upon a basis of 12½% when the book value is taken for taxation purposes. Any earnings in excess of this are taxed proportionally.

The state of Connecticut taxes its banks and trust companies at 1% of the market value of the stock.

South Carolina uses the book value as the basis for taxation. The stock is taxed at 42% of this amount.

The state of Montana uses the book value as the basis for taxation, and taxes the value of the stock, less real estate holdings, on the basis of 40% of this value. The real estate holdings are assessed on the basis of 30% of their value.

In Wyoming, book value of capital, surplus and undivided profits, less the assessed value of real estate, is the basis for taxation, but 50% of surplus and undivided profits are exempted.

In the state of Massachusetts, trust companies are subject to a franchise tax, using the market value of issued and outstanding stock as the basis for assessment, after deducting real estate owned, which includes all mortgages secured by Massachusetts real estate up to its assessed value. The balance, called the "corporate excess", is assessed at the average date of $19.41 per $1,000.00. There is a minimum tax of two-fifths of 1% upon book value of the stock.

In California, the state tax rate, which was formerly 1%, was increased to $1.16 recently, and is levied upon the value of the capital stock as determined by the capital, surplus and undivided profits. All real estate owned by the banking institution, which is assessed locally, is deducted from the book value of the bank stock.

In comparing these various methods of taxation, one cannot fail to be impressed by the variations in laws governing the assessment of banks and trust companies in the different states.

It is well known that in the states that are subject to the general property tax while deposits in banks and trust companies are taxable to the owners, the law is not enforced rigidly. In fact, in many instances not at all. If it was enforced through inquisitorial methods, it would mean widespread demoralization and commercial ruin, so that it is practically a dead letter. But some fair law should be passed in every state that would relieve the uncertainty and anxiety that each assessing period creates. Many states have passed laws regarding the taxation of deposits which recognizes this condition, and have attempted to effect protection to its citizens by enacting salutary and just laws.

In North Dakota, moneys and credits were taxed at three mills on the dollar up to 1919, this year, and will be upon an income basis from now on.

In the state of Minnesota, moneys and credits, including bank deposits, are taxed at three mills on the dollar to the owner.

In Maryand, bank deposits are not taxed.

The state of Kentucky recently passed a law assessing bank deposits at ten cents

upon the hundred dollars, the tax to be paid by the banking institution, with privilege of charging the depositors.

Virginia taxes bank deposits at twenty cents upon the hundred dollars.

The state of New York has an income tax becoming effective this year.

In Connecticut, deposits in national banks are not taxed unless they exceed $500.00. Saving deposits are exempted, due to a special tax paid by the companies.

The state of South Carolina does not tax bank deposits.

In Mississippi, deposits are not taxed, as the law provides that all moneys loaned at less than six per cent are exempt from taxation.

In Montana, moneys on deposit in banks and trust companies are taxed as credits and assessed at seven per cent of their value for taxation purposes.

Wisconsin has an income tax.

Massachusetts has an income tax.

In California, savings bank deposits are not assessable for taxation. Commercial bank deposits are taxable to the depositors as solvent credits.

Pennsylvania does not tax deposits of trust companies.

In Georgia, deposits in banks and trust companies are not taxed.

The state of South Dakota taxes deposits in banks and trust companies at the rate of three mills upon the dollar.

A deposit in a banking institution is a credit and a depositor a creditor. But unlike any other corporation, these debts are practically payable on demand, as notwithstanding the fact that many deposits are savings or time accounts, no good banking institution could refuse to pay any of these upon demand and must hold necessary reserves for this purpose. Further than this, the law requires national banks to hold ten per cent of their deposits as cash reserve deposited in the Federal Reserve Bank, without interest, and the various state laws require a certain percentage of deposits of state institutions to be held as cash reserve. This is idle money. The cash held in reserve earns nothing, and as these reserves have no earning power and are held as idle money because the law requires it, some relief from taxation should be given to each banking institution to compensate for the lack of earning ability of these funds. Practically the only objection that can be advanced against non-taxation of reserve requirements is that they are not the property of the bank, but belong to the depositors, and the law requires that a certain named per cent of the different kinds of deposits shall be maintained in cash as reserve requirements. But deposits are subject to taxation in nearly all states, and would not be affected by this exemption. Our contention is that this is idle money, money upon which the banking institution pays interest, especially that part which belongs to the savings accounts. If the financial institution is compelled to forego profit to protect its depositors, and cannot make such reserves an earning power, then the law should exempt such part of the surplus and undivided profits as is absorbed by this reserve requirement.

No one contends that bank stocks should not be taxed, that is, the capital stock paid in, but to exempt that part of the surplus and undivided profits which is represented by idle money held by the institution to protect its depositors would be an encouragement to financial institutions to build up additional surplus and thereby better protect them.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Federal Income Tax — Oath to Return—Officer.—On demurrer to an indictment for perjury for falsely swearing to an income tax return, it was urged that a Commissioner of Deeds of New York City, before whom the oath in question was taken, was without authority to administer such oath. The court, upon an analysis of section 406 of Regulations 45, found that while "very blindly worded", it was clearly intended to cover the whole matter and that much the most rational and in fact the only possible interpretation was that the scriveners meant to in-

clude all such officers as were authorized by the local law to take oaths in their several districts, and that therefore the officer in question was authorized to take the oath in question.—*United States* v. *Benowitz,* U. S. District Court, So. Dist. N. Y., Oct. 20, 1919, printed as part of T. D. 2952.

INSURANCE COMPANIES—EXCISE TAX—GROSS PREMIUM RECEIPTS. — The Ohio supreme court has construed the tax on foreign insurance companies doing business in that state as applying to the gross premiums stated on the face of the policies without deduction for credits by way of dividends allowed the policyholders. The statute provides that the tax shall be imposed upon the "gross amount of premiums received . . . without . . . any deductions whatever". It was contended that this meant the actual amounts received by the companies after allowance of the dividend credits. The court, however, found in previous legislation a definition of the phrase "gross premium receipts" as meaning the face amount of the premiums, and held that legislative definition conclusive. — *State ex rel. Northwestern Mut. Life Ins. Co.* v. *Tomlinson,* 124 N. E. 220.

PUBLIC PURPOSE—COMMERCIAL ENTERPRISE. — It is held that under the constitution of Maine (art. 4, pt. 3, § 1) taxation, either directly or indirectly, for the chief purpose of developing and maintaining storage reservoirs for conserving the waters of the great ponds and increasing and regulating the flow of the outlet rivers and streams, for the purpose of increasing the capacity and value of privately owned water powers on said rivers and streams, is beyond the power of the legislature; that the state cannot enter upon a commercial enterprise, however alluring the prospect, and tax the people for its promotion, it being essential that the purpose for which taxes are raised, be one proper for the government to carry out.—*In re Opinions of the Justices,* 106 Atl. 865.

"ASSESSMENTS" VS. "TAXES". — In a recent cse the court held that the proportion of the cost and expenses levied upon the grand duplicate against the taxable property of a township for the construction of road improvement, was a tax and not an assessment. Discussing the difference between a "tax" and an "assessment", the court says:

> "in a general sense a tax is an 'assessment' and an assessment is a 'tax', but there is a well recognized distinction between them, an assessment being confined to local imposition upon property to pay cost of public improvement in its immediate vicinity, and levied with reference to special benefits to the property assessed."

—*State ex rel. Village of Leipsic* v. *Maentor,* 124 N. E. 70.

SITUS — PERSONAL PROPERTY — EXECUTORS AND TRUSTEES. — The Florida supreme court recently considered the situs for taxation of the intangible property of the estate of Henry M. Flagler. Certain persons were named in the will as executors and trustees. A tax was imposed upon them as trustees in the county of the residence of the decedent. Suit was brought to enforce the tax, which was dismissed in the lower court and the supreme court affirmed, holding that while property held by executors is taxable at the residence of decedent, that held by trustees is taxable at the residence of trustees. In this case it was held that the property taxed was being held by the trustees as such and not as executors, and they being non-residents of the county, the assessments were illegal.—*State* v. *Beardsley et al.,* 82 So. 794.

CREDITS—DEDUCTION OF DEBTS—UNIFORMITY.—A unanimous decision recently rendered by the Kansas supreme court overturns a construction by the administrative officers of many years' standing and is of interest in view of its ultimate effect upon the tax system of the state. By a territorial law a taxpayer was authorized to deduct his indebtedness from his personal property of every sort and pay upon the difference. In 1866 the deduction was limited to and authorized only from credits, which were defined to exclude mortgage indebtedness. Again in 1907, the limitation was removed, the section defining credits being repealed, leaving the deduction from "credits" undefined.

In this state of the statutory law, it has been held uniformly that mortgage in-

debtedness could not be deducted. Recently an owner of a note secured by a mortgage claimed the right to deduct therefrom an indebtedness evidenced by a note also secured by mortgage and pay upon the difference and brought an action to enjoin the collector from collecting a tax upon any larger sum. The court describing the legislation above noted, readily held that the terms of the statute admitted of no other construction than that the deduction was authorized, and such a holding appears so obviously required that one is curious to understand the theory of the administrative practice in effect heretofore.

It was contended, however, that such a deduction granted to one species of property and not to others, violated the uniformity provision of the state constitution. The court concedes the point as plausible that inequality necessarily results unless each taxpayer is taxed upon his net worth, but indicates that such a view is not supported by any adjudication. It cites one case, holding that the allowance of deduction for indebtedness from one class of property and not from all is a violation of equality, being in effect an exemption (*In re Assessment and Collection of Taxes,* 4 S. D. 6); another, holding such a deduction from money and credits inadmissible on similar grounds (*Exchange Bank* v. *Hines,* 3 Ohio St., 1, 22, 23; see, however, *Fayette County* v. *People's & Drover's Bank,* 47 Ohio St., 503), but finds the rule generally accepted to be that deductions may be permitted either from all personal property or from credits alone (37 *Cyc.* 744; 1 Cooley on Taxation, 3d Ed. 269-273; *Stumpf* v. *Storz,* 165 Mich. 228).

Reference is made to a suggestion in *Gray's Limitations* (sec. 1398) that deductions would be prohibited by reason of the provisions of Art. 11, Sec. 2 of the Constitution because, if allowed, the equality of burden thought by him to be extended to banks by that section, would be violated. The court, by reference to the decisions in Ohio, from which the provision in question was taken, shows that the prohibition against deduction therein contained in both constitutions, is that of $200 allowed individuals and not a general deduction of indebtedness. It holds that as deductions of indebtedness from credits have been allowed in the state since its organization, condemnation of the practice would not be announced except upon a very clear showing and finds no serious difficulty in holding the statute in question valid. — *Ritchie* v. *Ahlstedt,* Kansas Supreme Court, December, 1919.

CORPORATION — CAPITAL STOCK — VALUATION—DEDUCTION OF REAL ESTATE.— An Iowa corporation invested all its capital in Minnesota real estate. It did no business in Iowa except to hold meetings. Its capital stock was assessed in Iowa under a statute which required the deduction of real estate wherever located from the "real value" of the shares. Its stock outstanding was $463,000, value of real estate $250,000, indebtedness from $162,000 to $195,000. It had paid no dividends.

The assessment of $100,000 fixed by the assessor was vacated by the district court and this action was affirmed by the supreme court.

The claim of the corporation that it was not taxable in Iowa because doing no business and having no property there, was rejected by the court upon the ground that the principal place of business fixed in the charter governed. — *Koochiching Company* v. *Mitchell, County Treasurer* (two cases), 173 N. W. 151.

DOING BUSINESS—LEASED RAILROAD.— The supreme court of Massachusetts has recently rendered two opinions determinative of the right of that state to tax a corporation whose entire property is leased to and operated by another corporation.

While holding that a railroad corporation cannot merely, of its own volition, sell, mortgage, or lease its property or franchise in such a way as to deprive itself of the power of accomplishing the ends for which it was created, the court found that the lease "stripped" the respondent of power to operate its railroad and to perform most of the public services which justified its corporate existence, holding that "It exercises none of the distinctive functions of a railroad corporation. Its corporate energy is reduced below the point of conducting business for profit."

The conclusions reached in both cases are in harmony with decisions of the federal courts in their construction of the

meaning of "a corporation organized for profit and engaged in business", as those words are used in the U. S. corporation tax law.—*Attorney General* v. *Boston & A. R. R. Co.,* 124 N. E. 257, and *Attorney General* v. *Ware Riv. R. Co.,* 124 N. E. 289.

FOREIGN CORPORATION—ESSENTIALS OF PERSONAL JURISDICTION — DOING BUSINESS — SERVICE OF PROCESS. — While not directly involving a tax, a recent case decided by the supreme court of Illinois is interesting by reason of the discussion of what constitutes the "doing of business" by a foreign corporation in such manner as to make it subject to jurisdiction, and lays down the conditions necessary in order to give such jurisdiction.

It was suggested that the provision of the federal constitution required full faith and credit to be given in each state to the judicial proceedings of every other state, and that the act of congress passed in pursuance thereof, prevented an inquiry into the jurisdiction of the court by which the judgment offered in evidence was rendered. As to this the court said:

"It has been held by the federal courts that the record of a judgment rendered in another state may be contradicted as to the facts necessay to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist; that want of jurisdiction may be shown either as to the subject matter or the person."

The three conditions necessary to give a court jurisdiction *in personam* over a foreign corporation as settled by the federal decisions are stated to be:

First, it must appear that the corporation was carrying on its business in the state where process was served on its agent.

Second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state.

Third, the existence of some local law making such corporation amenable to suit there as a condition, expressed or implied, of doing business in the state.

In order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district, to such an extent as to subject it to the jurisdiction and laws thereof.

No all-embracing rule has been laid down by the courts by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to make it subject to jurisdiction. The business must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. The case is of interest to every corporation engaged in business outside of the state of its domicile. — *Pembleton* v. *Illinois Commercial Men's Ass'n,* 124 N. E. 355.

UNIFORMITY—"TAXING DISTRICT".—A general school code applicable to the entire state of Delaware was passed, superseding the prior special laws applicable to various cities and subdivisions. The taxes in the new school districts created were assessed upon valuations made for county purposes and levied by the county authorities. This feature of the law was attacked as repugnant to the state constitution which required uniformity of taxes "within the territorial limits levying the same". The supreme court, in response to request by the Governor, as authorized by the constitution, advised that there was no violation; that the county authorities were mere administrative agencies for the levy and collection of the school taxes; that as the taxes were uniform within the school districts, this was sufficient to satisfy the uniformity clause.—*In re School Code of 1919,* 108 Atl. 39.

UNIFORMITY AND EQUALITY — INDIAN LANDS — DISCRIMINATION. — Lands in an Indian reservation, rendered taxable by Act of Congress, were claimed to have been subjected for many years to arbitrary grossly excessive and discriminatory assessments by systematic overvaluation as compared with other lands in the same county. By direction of the Attorney General of the United States, the United States District Attorney filed a Bill in Equity on behalf of named members of the Indian tribe and all others similarly situated, to restrain the collection of the taxes on the alleged illegal assessments and to permit

payment on assessments found to be proper on an appraisement made under authority of an Act of Congress. The district court dismissed the bill on the ground that plaintiff had no interest in the lands and no duty or authority to contest the assessments. On appeal, the circuit court of appeals affirmed the decree upon the ground that as adequate relief could be secured in the state courts, no ground for equitable relief existed.

The United States supreme court held that both rulings were wrong; that while Congress expressly subjected the lands to state taxation, this could not be held to prevent the federal authorities from contesting state action which was in violation of law and which thereby tended to deprive the Indians of property rights guaranteed them by federal law; that the United States as guardian of the Indians had the duty to protect them from spoliation. Having the right to thus protect the rights of all the Indians, the United States was authorized to seek the interposition of a court of equity in order to avoid a multiplicity of suits, as held in *Greene* v. *L. & I. R. R. Co.,* 244 U. S. 499, 506, and also because the action of the state authorities was not a mere mistake or error committed in the enforcement of state tax laws but a systematic and intentional disregard of such laws, giving rise to a right to invoke a court of equity in order that an adequate remedy might be afforded, as held in *Cummings* v. *Bank,* 101 U. S. 153; *Raymond* v. *Traction Co.,* 207 U. S. 20, and *Greene* v. *R. R. Co., supra,* and as more recently fully covered by the ruling in *U. P. Ry. Co.* v. *Weld County,* 247 U. S. 282. The decree was accordingly reversed and the cause remanded.—*U. S.* v. *Co. Commissioners of Osage Co., Okla.,* U. S. Supreme Court, December 15, 1919.

Review—New York Procedure. — A petition to review assessments because of overvaluation which fails to set up the amount or extent thereof, or to state the fair market value of the property, wherefrom the overvaluation can be deduced, or to allege instances of inequality, is fatal to the proceeding. — *People ex rel. Mills* v. *Purdy,* 177 N. Y. S. 277.

Tax Commission — Review of Decision—Appeals.—The court of appeals of Maryland has recently examined and affirmed prior decisions holding that on an appeal to the courts from a decision of the state tax commission, the courts can only review questions of law and cannot take evidence or make assessments. — *Fidelity Trust Co.* v. *Gorman,* 106 Atl. 847.

Penalties—Mistake of Law. — Failure to pay privilege taxes, though due to an honest belief that they were not due and though the failure was induced by acquiescence of collector, acting under a ruling of a lower court, was held by the Mississippi supreme court not to relieve a taxpayer from the penalties provided upon such failure.—*Brittain & Henry* v. *Robertson,* 83 So. 4.

Uniformity—Review—Questions of Fact—Real Estate Assessments.—By a decision of the Arkansas supreme court, it was held that there must be uniformity in laying assessments upon taxable property and that an assessing board cannot discriminate against one tract of land in favor of all other property of the same kind in the county (187 Ark. 942); that unless the undisputed facts establish that the findings of the lower court are erroneous, they cannot be reversed on appeal. In this case the court, upon an examination of the evidence as to assessments in general of lands similar to those of complainant, held that as reduced by the circuit court, they were fairly equal and affirmed the judgment.—*Doniphan Lumber Co.* v. *Cleburne County,* 212 S. W. 308.

Review — Certiorari — New York Procedure Interpreted.—In two recent cases, various technical requirements to support a petition in *certiorari* to review assessments are stated. Petition verified by attorney is insufficient. Petition verified on information and belief is defective. Petition and writ may not be amended to correct a jurisdictional defect after the expiration of the time allowed for presentation of the petition. The requirements for review in the New York City charter and in the general state law, being substantially the same and not being inconsistent, must be read together. The statutory requirements, even if technical, must be complied with. Failure to specify individual in-

stances of inequality complained of, is a jurisdictional defect. Under the New York charter proceedings must be instituted on or before the first day of July following the determination sought to be reviewed. — *People ex rel.* v. *Purdy* (two cases), 177 N. Y. Supp. 45, 48.

REFUNDS—MISTAKE OF LAW. — It appeared that a mortgage recording tax had been paid, the mortgagor deeming himself possessed of title to the land in question. Thereafter by appropriate judicial proceedings a decree was entered canceling the deed of the property to the mortgagor and also the mortgage, whereupon action was brought to compel the return of the recording tax, under a statute authorizing the state auditor to pay back taxes paid when no tax was due. It was held that the statute in question would not support the claim, that it was only applicable where a tax was not in fact due which was not the case here.

It was also held that no recovery could be had as the payment was voluntary and not under duress, which was defined to be such compulsion as makes action necessary in order to enable the person to save himself or his property; that in this case the payment was wholly voluntary and within the option of the mortgagor, the state not being interested in his private obligations. —*Greene* v. *Federal Coal Co.,* 212 S. W. 580.

INHERITANCE TAX — PERSONAL PROPERTY — DEDUCTION OF MORTGAGE ON REALTY.—In reversing the decision of the Surrogate, the appellate court held in a recent case that mortgage indebtedness secured by real estate located outside the state should be deducted in fixing the transfer tax under the New York law, all valid debts being deductible, the tax being on the net value of the property transferred.—*In re Vanderbilt's Estate,* 175 N. Y. Supp. 863; see BUL. IV, 111.

INHERITANCE TAX—NEW YORK LAW—WHEN TAX DUE—TAX ON REMAINDERS—VALUE WHEN COMPUTED. — On a recent appeal from the Surrogate's decision, the court held that remainders willed to sisters, the vesting of which was postponed until the death of the wife, were taxable at the death of testator and only under the law in effect at that time, they being personalty. The exemption from tax of an estate less than $10,000 means the entire estate and not the individual shares. Where the will directs the transfer tax to be paid out of the estate by the executor, it is not necessary to apportion the tax among the legatees. — *In re Goldenberg's Estate,* 176 N. Y. Supp. 201.

INHERITANCE TAX — JOINT BANK ACCOUNT. — A person opened with her own funds an account in a National Bank, in her name "or [another] either or survivor". It appeared from a deposition filed by the depositor that she made the deposit with the sole purpose of providing funds that might be used by the decedent in case of accident to the depositor.

It was held by the county surrogate that the entire deposit was taxable as a transfer to the depositor upon the death of the other owner of the joint account, under section 200 subd. 7 of the New York Tax Law.—*In re Bigelow's Estate,* 177 N. Y. Supp. 847.

INHERITANCE TAX — EXEMPTIONS — "FREE"—FOREIGN EDUCATIONAL INSTITUTIONS. — It was held that the word "free" in a statute exempting property passing to educational institutions "open to the free use of the public", from collateral inheritance tax, does not mean that no compensation is to be exacted but that they are to be open and free to all who desire to use them.

It was also held that the provision exempting property passing to institutions "within this state" was intended to limit the exemption to state institutions, as against the claim that the punctuation used should be construed to make the limitation apply to but one class of institutions. The opinion is useful by reason of an interesting discussion of the rules of construction as affected by punctuation marks. — *In re Petersen's Will,* 172 N. W. 206.

INHERITANCE TAX — FEDERAL ESTATE TAX A CHARGE UPON RESIDUARY LEGATEES. — Following the line of reasoning adopted in the New York case of *In re Hamlin,* 124 N. E. 4; the supreme court of Massachusetts holds in accord with that decision, that the tax levied upon decedents' estates by Act Cong. Sept. 8, 1916,

as amended, is an estate tax chargeable entirely against the residuary estate, and not apportionable pro rata among all devisees and legatees. The opinion sweeps after the *Hamlin* case and if there is any crumb of comfort left for an appellant or any point not covered or not effectually disposed of by the court, we have failed to notice it. The court says, among other things:

"The heading or title given to the tax by the statute itself . . . described the kind of pecuniary imposition levied as an 'estate tax'. The statute ignores entirely the disposition made of the estate by the testator or by the law as to interstate property, and looks only to the net estate itself as defined. The tax in question is an estate and not a legacy or succession tax."

—*Plunkett et al.* v. *Old Colony Trust Co.*, 124 N. E. 265.

"DOING BUSINESS"—PRIVATE INVESTMENTS—INHERITANCE TAX ON NON-RESIDENT.—Another phase in the series of attempts by the state of New York to impose an inheritance tax upon the estate of the late Hetty Green, was recently covered in a decision by Surrogate Fowler that her estate was not taxable under that provision imposing a transfer tax upon "capital invested in business in this state by a nonresident of the state doing business therein". Mrs. Green in previous litigation was held domiciled in Vermont and not taxable as a resident. The present action sought to tax the estate on account of decedent's investments in the state, consisting of deposits in banks, mortgages on New York real estate, purchases of New York City bonds and corporate stock and certificates of indebtedness. It was shown that she invested the income from such investments in such securities. It also appeared that a corporation had been formed to hold her active investments or those requiring the frequent signing of papers. She maintained no office in the state and made no transactions except those required to protect and employ her own property.

Under these conditions the Surrogate held that the decedent was not doing *business* and had no capital employed in *business;* that her activities were not in a legal sense *business* but her own private transactions and affairs; that the investment of private funds was not *business*. This opinion by this venerable and scholarly Surrogate, who has recently been retired under the age limit, is perhaps the last of a long series of decisions which have been noted for their evidence of deep and profound study and thought, breadth of discussion and remarkable insight into the sources of the law and their application to the life of the times as reflected in the entirely human incidents arising in connection with the work of a court of Probate. In this case, for instance, there is to be found a profound discussion of such subjects as the attitude of a court towards the economic questions arising in tax controversies, and the tendencies toward socialism in democratic republics. But of greatest interest is the Surrogate's careful historical analysis of the troublesome word "business" and of the true definition of what constitutes "doing business". In this discussion he takes the reader through the texts of the lexicographers and finds them inadequate. In view of the ambiguity thus developed, he resorts to the Civil Law "that great fountain of modern rights and legal principles", finding instructive suggestions in the money transactions of the Romans, concluding as above stated, that the decedent could not be classed as "doing business" by reason of the methods adopted in caring for and managing her own property. Incidentally, he strongly condemns the use of the words "business" or "doing business" in statutes, words which he says may mean something or nothing, and suggests the use of some such word as "trade", "commerce" or "brokerage", words which have a settled meaning by the common law. Such words retain their common-law significance upon each repetition of their use, while the word "business" is "among the most indefinite in the English language (*Parker Mills* v. *Commissioner,* 23 N. Y. 242; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171; *Smith* v. *Anderson,* 15 Ch. Div. 247, 258)". A reading of this opinion in full will well repay the reader.—*In re Green's Estate,* 178 N. Y. Supp. 353.

LICENSES—"DEALER"—AGENTS.—A corporation was engaged in selling coal on a commission basis, the orders from its customers being transmitted to coal operators and shipments being made to such customers. The coal was billed to the corporation, generally at the price paid by

the customers less the commission agreed upon, the corporation being reponsible for the payment.

The corporation claimed immunity from the Pennsylvania mercantile license tax as not being a "dealer" but an agent or factor selling for account of the coal operators. This contention was rejected by the court and the tax held properly assessed.—*Commonwealth* v. *Thorne Neale & Co.*, 107 Atl. 814.

Licenses—Police Power—Uniformity Clause—Prohibitory Fee.—A license fee in South Carolina on emigrant agents amounting to $2,000 was contested as prohibiting lawful acts and as contravening the constitutional provision which was claimed to require graduated license fees. The court rejected both claims, holding that where the doing of an act is within the police power, the legislature has authority to prohibit it entirely. The constitutional provision contains the clause that the legislature "may" provide a graduated license on occupations or business. The court held that the word "may" did not have the effect of the word "shall" as in the case of the uniformity clause in the same section; that the word "may" was merely advisory; that it would be unreasonable to suppose that it was the intention of the constitution to require a graduated license in those cases where the licensees were mere instrumentalities in the enforcement of the police power.—*State* v. *Reeves*, 99 S. E. 841.

Licenses — Two Laws Enacted on Same Day—Which Applicable—Involuntary Payment—Recovery.—The Kentucky court of appeals held that two license tax statutes enacted on the same day are to be presumed to be effective at the same time and will be so construed if possible, and when both taxes are applicable to the same person, a construction will be given which will avoid double taxation.

Complainant corporation, a manufacturer of distilled spirits, paid a license tax as such. Thereafter, on demand, it paid a corporation franchise tax on capital stock, under a law enacted on the same day which contained a provision excepting "all corporations which, under existing laws, are liable to pay a franchise or license tax".

It was held that the corporation was liable only for the license tax as a manufacturer of distilled spirits.

It was further held that the payment was involuntary and that mandamus would lie to compel the state auditor to repay the tax illegally collected under a statute authorizing him to repay taxes which were not in fact due. The discussion of involuntary payment in general and the right of recovery is interesting.—*Greene* v. *Taylor Jr. & Sons*, 212 S. W. 925.

Licenses—Classification—Equality—Dog Registration Fees. — The constitutionality of a dog tax was recently upheld by the Tennessee supreme court. The questions had all been substantially considered in a previous case (*State* v. *Erwin*, 200 S. W. 973) but certain differences in the statutes were claimed to raise new questions. In this case the tax was applied only in counties having a certain population. It was held that this was not class legislation, a similar classification by counties having been upheld in *Thomas* v. *State* and *Sullivan* v. *State*, 188 S. W. 617 and 1153. To the objection that a dog without a license is no greater public nuisance than one with one, the court, following the *Erwin* case, replied that the distinguishing mark would enable identification, and further that the fee would "tend to reduce the number of worthless dogs". The objection that the act violated the constitutional provision against taking property without just compensation and against inequality in taxation of the same species of property, was met by a reference to the holding in the *Erwin* case that dogs are such a species of property as may be regulated in its ownership so as to protect the public and that the act was a police measure as distinct from a revenue measure. The tax of $1.50 for the dog in question, for non-payment of which the owner was fined and taxed with costs besides being doubtless put to considerable expense of appeal to the supreme court, was upheld.—*Ponder* v. *State*, 212 S. W. 417.

Licenses — Interstate Commerce—Peddlers — State's Designation of a Tax. — A recent decision of the United

States supreme court is interesting by reason of its restatement of principles frequently under discussion in license tax cases. In this case the subject of the tax was a vendor of soft drinks manufactured in Cincinnati and sold in Covington, Kentucky, customers being supplied according to their several requirements, from a stock of goods carried on a wagon from place to place. The case did not involve the filling of orders previously placed with the dealer, and the court therefore easily distinguished the decisions in the "drummer" cases such as *Caldwell* v. *North Carolina,* 187 U. S. 622, and those where the license tax tax was held to discriminate against the goods of another state, such as *Walling* v. *Michigan*, 116 U. S. 446, 454, referring to the clear distinction set forth in *Crenshaw* v. *Arkansas,* 227 U. S. 389, 399-400.

A license tax imposed upon sales such as those involved in the instant case was held clearly not violative of the commerce clause under well-settled authority, such as *Woodruff* v. *Parham,* 8 Wall. 123, 140; *Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296, and *Baccus* v. *Louisiana,* 232 U. S. 334.

The effect of the decisions mentioned was sought to be overcome by reason of a decision of the state court that the sales in question did not constitute "peddling" within the meaning of the state statutes (*S. O. Co.* v. *Commonwealth,* 107 Ky. 606; *Newport* v. *French Bros. Bauer Co.,* 169 Ky. 174, 185). As to this contention, the court held that it was one of statutory definition, using the following important language, which is likely to be widely quoted:

"it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather by the practical operation and effect of the tax as applied and enforced. The state court could not render valid by misdescribing it, a tax law which in substance and effect was repugnant to the federal constitution; neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision by inaccurately defining it. *St. L. S. W. Ry.* v. *Arkansas,* 135 U. S. 359, 362."

—*Wagner et al.* v. *City of Covington,* U. S. Sup. Ct., December 8, 1919.

Real Estate — Street Easements — Valuation. — In a case, which may be read with interest owing to the vein of sarcasm running through it, it was held that the valuation of a lot abutting upon a street must necessarily include the value of the easement in the street created by the deeds of the predecessor in title; that an attempt by a somewhat subtle process of manipulation, to cast an added burden upon the land owner by securing title to the street for the purpose of vacating the same as a private street, thus producing a taxable entity apart from the abutting land, would not be fostered by the court as by no such specious and devious method could the property owner be divested of rights. The easement was held to have no existence other than in connection with the land to which it pertained which had been valued with reference to and enhanced by the easement which could not thereafter be separately assessed.—*State* v. *West Cabanne Improvement Co.,* 213 S. W. 25.

Assessment of Unsurveyed Land on Public Domain—"Unknown Owners". —Another important decision, sustaining the Arizona Tax Commission, has just been rendered by the state supreme court. It concerned taxes for the years 1913-1916 on a tract of land known as "Baca Float No. 3". The title to this tract, embracing an area more than twice that of the District of Columbia, vast mineral wealth and rights of a multitude of settlers, was in litigation for many years, resulting in conflicting claims and entries and numerous decisions by the General Land Office and the courts. Finally, by a decision of the United States Supreme Court, rendered in 1914, the title was confirmed and the survey made in 1905, ordered filed, which was done in December, 1914. The Arizona Tax Commission, soon after its organization in 1912, took steps to secure taxes from this tract and ordered it assessed at $1,000,000, which was done, the assessments for the years in question being made to "unknown owners".

The assessments for 1913 and 1914 were contested because the survey had not been filed until after they were made, and hence it was urged that there was no definite land subject to assessment; that those made covered government land and were

illegal. The court found statutory authority for assessing a "claim to real estate" as property and, referring to the claims of title long asserted in the numerous controversies in the courts and before the Land Office, held that the assessments were valid, as against a claim to real estate. The assessments for 1915 and 1916 were claimed illegal because made vaguely, in part to unknown owners and in part to certain named owners of parts of the tract, without attempted description of the parts held in separate and distinct ownership. The court, after reviewing the assessment entries, held that they amounted to assessments to "unknown owners" as authorized by the statute and that the additional crude and imperfect attempts at a separation to different owners, were surplussage; that in view of the long-drawn-out litigation and the consequent delay in the determination of the title, which was not settled until 1917, it could not be expected that the assessing officers could fix the owners of the property and they were justified in assessing it to "unknown owners", relying at this point upon the decision of the New Hampshire court in *French* v. *Spalding,* 61 N. H. 395, and quoting from the opinion. Thus the assessments for all the years were held valid and a large accumulation of taxes made available to the county in question. The tax commission may properly feel elated at this satisfactory ending of this long-drawn-out controversy.—*State ex rel. Burgoon* v. *Watts et al.,* Ariz. Supreme Court, December 16, 1917.

Exemptions — Charity—"Indigent" Persons — Exemption as Contract—Discrimination—Classification. — The amendment in a general tax act of Massachusetts, withdrawing exemption of hospital property from taxation unless a certain proportion thereof and of its invested funds were used for the care of indigent patients, without charge, was the subject of review in a proceeding by an institution for abatement of taxes levied upon it, resulting in the discussion of various important questions. The court held that the "free charges" made the test of the exemption, included those for services and were not confined to those for the use of the property. "Indigent" persons were defined to be those who, having in view other imperative obligations, were unable to contribute any substantial amount toward their support in the asylum.

The limitation of the exemption was held not to violate any constitutional right as, in the absence of a binding contract, no one has a constitutional right to exemption from taxation which would be violated by changes in tax laws removing exemptions previously existing. The extremely limited number of institutions deprived of full exemption by the statute was held not to constitute such unjust and discriminatory treatment as to violate the equal protection clause of the state and federal constitutions, a point which was elaborately discussed by the court with full citation of authorities. Classification in exemption was stated to present a different question from classification in taxation.

The matter of the valuation of the hospital property received extended treatment, the meaning of "fair value" as applied to various species of property, including such as has no usual selling price, being discussed at length with reference to numerous authorities. — *Massachusetts General Hospital* v. *Belmont,* 124 N. E. 21.

Special Assessments—Billboard Advertising — Betterment Tax. — In an opinion rendered to the Massachusetts state senate, as to the constitutionality of several bills then pending, the Justices of the supreme court interpret Article 50 of the amendments to the constitution authorizing the legislature to "regulate" public advertising, as not permitting the prohibition of advertising signs, but only to establish reasonable limitations. They therefore hold certain portions of the bills unconstitutional which would prohibit the erection of signs in certain locations. One of the bills provided for a "special betterment tax" on the real estate, to be measured by the size of the sign erected thereon. This was held unauthorized as the signs did not constitute a betterment.—*In re Opinion of Justices,* 124 N. E. 319.

Special Assessments — Liability of Street Railway Right of Way — Liability of Municipality in Case of Invalid Assessment. — In a recent Oklahoma case the court, following a previous decision (*Okla. Railway Co.* v. *Severns Packing Co.,* 170 Pac. 216) held that the

right of way of a street railway was subject to assessment for benefits resulting from paving when the right of way was derived by grant without reverter.

It appeared that portions of the assessment were invalid, causing a deficiency in the proceeds applicable to the payment of the bonds issued to cover the improvement. The purchaser of the bonds brought action to recover a judgment against the city for the deficiency. The court held, citing numerous authorities, that the municipality became primarily liable to pay the contract price itself upon its failure to make sufficient valid assessments or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price.—*Oklahoma City* v. *Orthwein,* 258 Fed. 190.

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"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

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MR. FOOTE'S RECOVERY

Members will be deeply interested in what Mr. Foote considers his almost miraculous escape from permanent loss of eyesight. That his recovery is definite was brought home to the Editor through the receipt of a letter written in longhand conveying the welcome news. With this letter was enclosed the note which we print editorially and which well serves our purpose by calling attention to the mental vigor and the resourcefulness of the founder of the Association.

A NATIONAL CONVENTION TO DEVISE A READJUSTMENT OF THE FORCES OF FEDERAL AND STATE REVENUE

A readjustment of the sources of federal and state revenues is imperatively demanded to provide adequately for the growing public expenditures without stifling the continued development of industry and commerce.

Prosperity is dependent upon a well-devised and efficient government designed to protect and promote the development of industry and commerce.

The sovereign and effective powers of a government are dependent upon its ability to obtain sufficient revenues for its purposes without impoverishing the sources from which they are drawn.

It is fundamentally necessary that a tax levied upon any source of revenue shall be assessed with an intelligent understanding of its ability to pay and of the time at which payment can be made without restricting its productiveness. These requirements render it clear that the same source cannot be intelligently taxed by more than one taxing authority, unless a system is devised that will consolidate the assessments for the federal and state governments into one tax duplicate or return, designed to serve the purposes of each. Such a system will make it possible for the taxing authorities to determine whether the tax they propose to levy will or will not tend to destroy the source required to pay the tax.

When our federal government was developed, creating a Nation out of a Confederacy of states, the architects of the Constitution of the United States provided for its efficiency by designating certain sources of revenue for its exclusive use. exempting these from state taxation, but

they did not protect the revenues of the states in the same way by prohibiting the taxation by the federal government of any source of state revenue. As a result the growing expenditures of the federal government have compelled it to demand revenue in ever-increasing amounts from sources previously taxed by states only. This encroachment by the federal government upon the sources of state revenue has developed a mixed system of over-lapping taxes that is burdensome to the taxpayer by reason of the several forms of tax returns he is required to render in addition to the increasing amounts of taxes he is compelled to pay to the several taxing governments.

When the Constitution of the United States was formulated and adopted, the conditions under which industry and commerce were being developed were totally unlike present-day conditions. They have been entirely displaced by the improvements made during the years which separate the birth of our nation from its maturity. If improvements in the facilities by means of which industries and commerce are developed and promoted are to continue, it is unquestionably necessary that corresponding improvements be made in the executive machinery of the federal and state governments under the operation of which they must thrive.

The ever-increasing expansion of governmental functions, and of expenditures required for their support, renders this imperatively necessary. New devices are required to make it possible to secure the perfection and adoption of improved executive machinery that will enable governmental administration to keep step with the development of industries and commerce, induced by the substitution of steam and electric power for wind and water; railroads for freight wagons and canal boats; electric lights, telegraphs and telephones for tallow candles, oil lamps and mail coaches. Up-to-date improvements in governmental administrative machinery cannot be made by simply repairing the old devices. Basic changes must be made in federal and state constitutions on account of the changed conditions under which we are now living. New provisions governing the raising of revenues must be written into these constitutions, remodeling or displacing existing provisions controlling the raising of revenues, so adjusted that they will automatically synchronize with the articulation of all other devices. In this way only can a harmonious and an effective federal and state taxation system be perfected. The fact that the effective power of every government is dependent upon the efficiency of its power of taxation, and an intelligent exercise of this power, shows plainly where this work of reconstruction should begin.

To secure intelligent amendments in the federal and state constitutions to control the power of taxation properly, a national convention should be organized in which the federal and state governments and the taxpaying public shall be properly represented, for the single purpose of devising and aiding in securing the adoption of necessary taxation constitutional amendments. In this way only can a thoroughly up-to-date system of federal and state taxation be devised and made effective, having for its purpose the providing of all the revenue required by the federal and state governments and the progressive development of all forms of industry and commerce, as a means of increasing the revenue-paying capacity of every subject of taxation. Such a system of federal and state taxation will cause every fair-minded taxpayer to regard the tax he pays as a profit-producing investment. This will be an achievement worthy of a convention composed of members of high intelligence, representing all vocations, the federal and all state governments.

The creation and organization of such a convention may well be made the work of the *National Tax Association*. It has all the machinery necessary for doing such work promptly and effectively. The methods it has followed for twelve years in the organization and management of its annual conferences will guarantee its success in undertaking to organize a national convention for the reasons and purposes herein stated.

ALLEN R. FOOTE.

NOTES AND NEWS ITEMS

MODEL TAX SYSTEM REPORT

The receipt of numerous requests for copies of reprints of the report of the Model Tax System Committee, found at page 426 of volume 12, leads us to request that those desiring such reprints in quantities make request for the same without delay, as it will be necessary to distribute the type within a short time.

As we go to press, the 1920 edition of *Holmes' Federal Taxes* reaches us. We are unable to do more than announce the publication of this work, so especially important to many members at this particular time and to say that it appears in greatly enlarged form, now containing some 1150 pages. This fact, with the well-known special qualifications of the author, will at once indicate the usefulness and value of the book to all who have to do with the question of federal taxes.

The special commission to investigate the tax laws of **New Jersey,** of which our Executive Committee member, Commissioner Frank B. Jess, is chairman, has just made its report, which embraces such excellent features as an income tax, a business tax, county supervisors of assessment and limitation upon exemptions of real property. The report when available will be reviewed in detail.

The Tax Commissioner of **Massachusetts** makes certain recommendations and suggestions in his annual report, among which are the following:

That gifts made in contemplation of death be subject to inheritance tax.

That the complexities arising from the four classifications of taxable income and their taxation at various rates are so great as to suggest the advisability of abolishing the 3% classification and including it in the business classification. It is stated that of 8000 returns verified within the past two years, nearly one-half are found to be in error, either in favor of or against, the taxpayer. If this change is not made, it is suggested that the application of the tax be extended to dispositions of intangible property though exchange as a "sale" may be held to be limited to transfers for a "price in money". (See *Benjamin* on Sales.)

That the age limit for minor children for exemption from income tax from professions, business or employment, be raised from 18 to 21 years. This suggestion is supported by well-chosen observations.

The Constitutional Convention of **New Hampshire,** which first assembled in June, 1918, reassembled January 13, 1920, and finally adjourned after a session of sixteen days. A resolution submitting a well-phrased income tax amendment was adopted and one for a classified, graduated and progressive inheritance tax. More extended comment received from Commissioner Fellows will be presented in the next issue of the BULLETIN.

The **Nebraska** Constitutional Convention, now in session, is said to be quite certain to adopt some sort of proposal permitting classification of intangible property and income taxation and requiring the creation of a Tax Commission.

The **Illinois** Constitutional Convention, now in session, appears not as yet to have proceeded far with its work. A significant and exceptional feature is the creation of a committee on form, designed to pass upon various proposals as to their appropriateness as parts of the constitution. This rather unique plan ought to accomplish very helpful results.

The third annual Assessors' Convention of **Maine** was held at Augusta, January 14 and 15. State Assessor Stetson writes that the meeting was well attended and very helpful. The program covered a wide range of subjects, including road taxes, valuation of utilities, term of office of assessors, intangible property, basis of valuation, the New Hampshire Listing law, need of complete records in local assessment work, stock in trade, poll tax and the rural assessor's problems.

Honorable Ogden L. Mills who very kindly accepted the appointment to appear before the Select Committee on the Budget of the United States Senate on behalf of this Association, did so January 14. His remarks will be printed in a subsequent issue and may be found in the printed Hearings obtainable from Senator McCormick.

The **Kentucky** legislature is struggling with an assortment of tax measures designed to mitigate some of the injustices said to have resulted from the legislation of 1917. The segregation of certain classes of property for taxation for state revenue has apparently emphasized the burden upon real property which was left to carry the load of local taxes. In an attempt to equalize the burden bills have been introduced reducing the state rate upon real property from 40 cents to 25 cents, subjecting tangible personalty (now taxed for state purposes at 40 cents) to full local rates and intangible property (now taxed for state purposes at 40 cents) to an additional rate of 30 cents for local purposes.

From Secretary Ives of the **Minnesota** commission we have the following account of the recent tax conference held in that state:

The fourth annual meeting of the Minnesota Tax Conference was held January 21 and 22 at the Minneapolis City Hall and was well attended by delegates from a majority of the counties of the state. This conference is an unofficial organization of those interested in tax problems and already is exerting considerable influence in a legislative way.

Much of the discussion this year had to do with proposed amendments to the Minnesota constitution, to be voted on at the general election Nov. 2d next. The most important of these from a tax standpoint extends the legislative power over taxation by permitting the legislature to exempt. either in whole or in part at its discretion, household goods, wearing apparel, tools, implements and machinery, agricultural products in the possession of the producer thereof, and the property of county fair associations. It also permits the legislature to enact a progressive and graduated income tax law and provides that such a tax may be in lieu of taxes on any class or classes of personal property, as the legislature may determine. The amendment was explained by Samuel Lord, member of the Minnesota Tax Commission, and the conference went on record as favorable to its adoption. An energetic campaign of education will be carried on.

The conference also approved the proposed constitutional amendment requiring railroad companies to pay local improvement assessments in addition to the present gross earnings tax of five per cent. The present tax is in lieu of all other taxes and assessments on the property of the companies used for railroad purposes and precludes the imposition of any local improvement levies.

The issuance of $100,000,000 in state bonds for the paving of 7,000 miles of highway within the state connecting every county seat, also was approved. This proposition is being submitted in the form of constitutional amendment in which the highway routes are incorporated. The bonds are to be retired and the interest paid by means of a special tax on automobiles.

The conference also asked the legislature to appropriate money for the payment of school, highway an educational taxes which may be levied on state-owned land. The state owns approximately 2,000,000 acres of wild land in the northern district and its exemption from taxation has retarded the growth of the surrounding territory.

The substitution of the county assessor system for the existing system of local assessors also was advocated.

Other numbers on the program included the following: "Tax Problems and the Farmer," A. D. Wilson, director agricultural extension, University of Minnesota; "Tax Problems in Cities of the First Class," C. T. Moffett, member of Minneapolis Real Estate Board; "Some Causes of Growing Tax Rates," J. G. Armson, chairman, Minnesota Tax Commission.

L. H. Bugbee of Carlton, president of the Minnesota Federation of Farmers' Clubs, was elected president of the conference, W. L. Harris of Minneapolis, vice-president, and John Dwan of Two Harbors was re-elected secretary. Mr. Dwan has served in this capacity since the conference was organized, and attended the

last convention of the National Tax Association.

Commissioner Peckinpaugh of **Ohio** sends the following comment on the situation there:

The situation in which the General Assembly of the state of Ohio finds itself as to the taxation problem on account of the defeat of the classification amendment to the constitution at the recent general election is, to say the least, exceedingly perplexing.

Pending the vote on the classification amendment the General Assembly appointed a bipartisan special joint committee on taxation with power to employ legal and expert assistance and to proceed, during a recess of the Assembly until December, to draft legislation for the relief of taxing districts which are unable to secure sufficient revenue under the present law. The committee proceeded upon the theory that the proposed amendment would pass and prepared an income tax bill, having theretofore reported and recommended a direct inheritance tax law which was passed by the Assembly and became effective June 5, 1919. This act was intended to make up the deficiency brought about by the loss of revenue from the liquor traffic. A bill authorizing a graduated license fee on automobiles was also reported by the committee, passed and is now being contested in the courts.

After the classification amendment was defeated at the election in November the committee favorably reported the income tax bill, which was promptly defeated in both branches of the Assembly, principally upon the ground that it necessarily contained inquisitorial provisions which would disclose intangible property to the taxing officials, with the result that it would thereby be subjected to taxation. It was strenuously opposed by banks and other financial institutions on the ground that it would seriously injure their business. After repeated attempts to reconsider the votes and pass the bill in an amended form, all hope of passing it was abandoned and the Assembly again recessed, this time until January 12, 1920, at which time the committee reported a bill for the relief of the situation by allowing taxing authorities to levy for sinking fund and interest purposes regardless of the provisions of the tax limitation law. The House passed the bill after amending it so as to allow this procedure only upon a majority vote of the electors in the district. The Senate very promptly passed the bill after restoring it to the form in which it was recommended by the committee and it then went to conference, where it is at the time of this writing, with very little if any prospect of agreement.

There is an attempt now being made to get together on a proposal to submit a new classification amendment which shall contain a provision limiting the tax rate to one per cent on any subject. It is claimed that the other amendment failed largely by reason of the people being averse to permitting the General Assembly to fix the classes and rates upon each class, with the tendency always to overstep the tax limit law. The object of the new proposal is to overcome that objection.

A number of minor bills looking to an increase in state and local revenues have been proposed, the most important being a production tax of one per cent on the value of all minerals produced in the state.

THE CLASSIFIED TAX LAW IN KENTUCKY

PEYTON N. CLARKE
Secretary, Kentucky Tax Reform Association

The state of Kentucky adopted a plan of classification and separation of property for taxation in 1917, and the operation of the new tax laws for 1918 and 1919 afford an opportunity to compare the plan at present in force with the so-called uniform or General Property tax formerly in operation and also to answer some of the criticisms and correct the garbled statements published by advocates of uniform taxation in this and other states.

Prior to the adoption of the last state Constitution in Kentucky in 1891, the legislature was empowered to enact taxa-

tion laws without any constitutional restriction. In the tax laws then in force there was no attempt at uniformity and various methods were observed in taxing different classes of property and attention may be called to the fact that in the previous decades from 1870 to 1890 the state had prospered exceedingly by reason of the liberality with which capital as an element in the development of the states' resources was treated in respect to taxation.

The new Constitution, however, deprived the legislature of the power to enact any tax measures contrary to the General Property tax, which was incorporated therein, and provided that all classes of property should be uniformly taxed.

Under the General Property tax the only property really assessed was real estate; as the valuation of personal property depended on the returns made by taxpayers who were practically their own assessors and it naturally followed that from the inception of the *then* new law, real estate was saddled with the chief burden and this discrimination prevailed for the ensuing quarter of a century.

The General Property tax was put into effect in 1893 and the assessment started out as follows:

Real estate	$424,734,838
Personal property	144,006,308
Total	$568,741,146

The state tax rate on all kinds of property was at that time 42½ cents on each $100, and in the intervening years up to and including 1917, it had been found necessary to increase it periodically to 55 cents, the assessment for 1917, the last year under the General Property tax, showed:

Real estate assessed at	$713,835,438
Personal property	208,621,043
Total	$922,456,481

The fact that the expenses of the state had been exceeding the income for some years, with a menacing debt piling up, indicated that something was wrong with the revenue laws, but so tenacious are people of constitutional provisions and so apprehensive of any tampering therewith, it required a long time to awaken them to a realization of the situation and to demand a change.

Students of economics knew that the state had grown in wealth far beyond the figures shown in the assessments, that the United States Census report for 1910 had placed the value of taxable property in the state at $2,500,000,000 and a special tax commission appointed to investigate the question, estimated the taxable wealth at $3,500,000,000 in 1917 of which it appeared that only about one-fourth paid taxes and that real estate paid seven-ninths of all the property taxes collected.

Various tax reform organizations and special commissions appointed by Governors and the Legislature, published the results of their investigations and the people of the state were finally aroused to action, as it was clear that the revenue was deficient and that under the General Property tax there were only two ways to replenish it, by increased assessments or a higher tax rate.

Inspired by the experience of some other states, a "State Tax League" was organized in Kentucky and by a systematic campaign of enlightenment and with a numerous state-wide membership of studious citizens, an amendment to the Constitution was in time secured, restoring to some extent the power of the legislature to enact taxation measures and daylight commenced to break through.

The amendment authorized the legislature to *classify property for taxation, to determine which classes should be taxed for local, county and municipal purposes, and to fix different rates on different classes.* The old law, requiring that all property shall be subjected to taxation for state purposes and also that property must be assessed at the "fair cash value" remains unchanged.

The advocates of classification calculated that a rational tax would produce more revenue than an inequitable and unenforcible tax and proceeded on the principle of *more property to tax, rather than more taxes on property*, and as another tax commission was at that time struggling with the problem, to be acted upon later by the legislature, the State Tax League delved deeply into the proposition and suggested certain plans.

They reasoned that intangible personal property, comprising bonds, stocks, notes, accounts and money could not stand triple taxation for city, county and state pur-

poses, approximating three per cent and which had accounted for the failure of taxpayers to list it, and proposed that such intangible property be taxed by the state only, figuring that as little of it had been assessed it would interfere but little with city and county revenues, and that if not taxed for the latter purposes, the owners could well afford to pay a reasonable state tax on it in lieu of all other taxation.

It was considered desirable to encourage manufacturing, and that therefore for many and obvious reasons manufacturing machinery, raw materials at the plant and products in process should be taxed for state purposes only.

Agricultural products grown within the year are exempted by the Constitution from all taxation and agricultural implements were included in the exemptions from local taxation and to afford further relief, it was proposed that live stock should be taxed at a nominal rate, as also money on deposit in Kentucky banks, to prevent its deposit elsewhere to escape undue taxation. The state revenue had been falling behind about $500,000 annually and it was necessary to provide for this. In order to accomplish it, very close calculations were made and published to show how it could be accomplished.

The revenue from the property tax in 1917 under the old law was $5,073,510 on an assessment of $922,456,481 at the uniform rate of 55 cents, and it was figured that an assessment of $1,542,500,000 would produce $5,630,000 or say $556,490 more revenue than in 1917, at the rates proposed of 40 cents on property generally and 10 cents on live stock and bank deposits.

The result was almost phenomenal, as the assessment for 1918, under the new law, was $1,583,121,230 and the revenue $5,644,110, or say $570,600 more than in 1917, which shows that there was no mere guesswork in the calculations.

The further purpose of distributing the burden more equally was accomplished to a gratifying extent, as the assessment for 1918 showed the proportions as follows:

Real estate	$870,982,809
Personal property	712,138,421
Total	$1,583,121,230

Owing to the reduction in the state tax rate, real estate, although assessed higher, paid less taxes than in 1917. Live stock paid much less and other personal property contributed the difference.

The operation of the new plan was successful and completely confirmed the claims of the advocates that a rational tax would develop more property to tax and lighten the burden on all.

There were some objections, as there always will be to any tax laws, but the complaints were so irrational that they received little sympathy. A manufacturer in a small town where the local tax rate was 75 cents complained because a rival in a larger city, where the rate was $1.50, received twice as much benefit by the exemption of machinery and raw materials, and another said it was unfair to tax his real estate and eliminate his bonds from local taxes. These were samples of the discontent manifested.

As "it is property and not people that is taxed" and each class of property is uniformly taxed for the purposes for which it is taxable, there is no discrimination, for while the state does not presume to dictate in what kind of property the people shall invest their money, the law very properly assumes to tax the investment no matter what or where it is, or whether the owner selects to live in a town or in the country.

Real estate is very properly taxed for all of the purposes of state, county and town, as its value is largely determined by its location and taxes on real estate are in the nature of an investment, as the revenue is chiefly spent on roads, improvements, schools and protection, which adds to its value; but the taxation of bonds, stocks, notes and money detracts from their value by lessening the income, and a bond is worth no more to the resident of a city than to a dweller in the country.

The apprehension that the exemption of certain kinds of property from local taxation would disturb the revenues of counties and towns was discounted by reason of the comparatively small amount of tax which had been received from these sources and because of the normal increase in assessments of other taxable property which enabled a reduction of tax rates in some localities and produced larger revenues in others obtained from formerly omitted and undervalued property. Some adjustments were essential, but the general effect was

negligible. In addition to real estate, counties and towns derive revenue from a large amount of tangible personal property, including banks, franchises, merchandise, household effects and other items not exempted from local taxation. The assessed value of tangible personal property for 1917 on which counties and towns lost revenue by local exemptions was less than $20,000,000, an average of $166,000 to the county.

The plan adopted in Kentucky, as tested by the first year's experience, was eminently satisfactory as it accomplished all that was expected and gave promise of continued improvement and the revenue was sufficient for the first time in many years. Personal property showed a disposition to share the burden with real estate. Property was assessed more in accordance with the law and intangible personal property owners could disclose and pay reasonable taxes on their holdings without fear of the confiscation of their incomes. The advocates of the new system felt satisfied and the prospect seemed clear.

Thus, in spite of abnormal and threatening war conditions and the general disturbance of economic affairs, the classification and separation plan, adopted in the state of Kentucky stood the test and demonstrated its advantages over the former methods of taxation in its equality and adequacy.

The second year found the country in the throes of actual warfare, with all of its disturbing influences and extravagant expenditures, the spirit of excess seemed to be injected into every form of government. Values of nearly every kind of tangible property seemed to double in a day and even the enormous taxes of the federal government seemed insignificant when compared with the profits that poured in.

The new tax laws in Kentucky had scarcely been tried out, and though meeting the requirements of the first year's test, the plan was on the eve of its second year's trial amidst all this public confusion.

The permanent state tax commission, an appanage of the new laws, inspired by the growing values and cognizant of its duty to see that property should be assessed at the "fair cash value", and with ample authority to enforce the law, deemed it expedient to exercise its power over the county assessing authorities, and knowing that the local returns were less than the increasing values justified, undertook to elevate them. Local assessing powers were advised that lands selling at from two to four hundred dollars per acre must not be assessed at sixty to eighty dollars, and as their instructions were general, and included some other classes of property, there was a murmur of discontent all over the state and indignation expressed openly in some localities. An exciting campaign for state offices was coming on and political candidates found it a popular theme to denounce the tax laws and especially the new laws, which they blamed for the increase in assessments.

The new laws were innocent, as assessments are provided for under an unamended constitutional provision requiring that all kinds of property shall be assessed at the "fair cash value" and it is not apparent how such a provision could or should be changed, but the people are not wont to consider such fine points and it was enough for them to know that their assessments were raised and it was natural to attribute it to a new law which many really knew very little about.

When the new plan went into effect the advocates, in anticipation of an increase in assessments, provided for a reduction in the tax rates as an inducement to list more property, and the people were satisfied; but the raising of assessments, without a corresponding reduction in the tax rates, offered no such invitation and it was this action which produced discontent, although the assessed value, of lands in particular, is still far below the fair cash value, if the owners would acknowledge it.

The assessment for the second year, 1919, was in consequence as follows:

Real estate	$1,031,080,835
Personal property	964,922,036
Total	$1,996,002,871

The revenue from which amounts to $7,131,850, or over $2,000,000 more than in 1917, under the old law, and about $1,500,000 more than 1918, the first year under the new law.

The revenue is apportioned by the legislature and it naturally follows that under the last levy, made in 1917, each fund receiving the same, will have much more income than the estimated expenses, and it

is impossible to apply any part of it to the reduction of the tax rates which was a fundamental principle of the new plan.

Had the state tax commission deferred the general increase in assessments another year, until the legislature made a new levy and fixed new rates, there would have been no cloud on the serenity of the situation, but it seldom happens that those who propose and those who enact the laws have any part in their administration; this obstacle will simply have to be overcome as others that strew the path of tax reforms.

The great question is, what has classification accomplished for Kentucky? and the answer can be summed up in a few sentences.

Estimating the taxable wealth of the state at $3,000,000,000, it has succeeded in securing the assessment of two-thirds as compared to one-third of the taxable property.

It has procured a fairer distribution of taxes as between real estate and personal property, by reducing the percentage on real estate from 77 to 57 per cent and increasing the percentage on personal property from 23 to 43 per cent.

It has enabled the state to invite capital and population for the development of its resources instead of repelling them.

Bank deposits, subject to taxation, have increased from $11,000,000 to $209,000,000 and intangible personal property from $70,000,000 to $512,000,000.

Mortgages may be recorded without subjecting them to confiscatory taxation of the income.

Property is assessed more nearly in accordance with the law and perjury in swearing to values is no longer necessary.

The revenue of the state is ample for meeting the expenses and the tax rates are lower.

Considering that the reverse of these conditions prevailed for many years and retarded the growth and prosperity of the state, and that capital and population are flowing in instead of going out, it may be stated without fear of contradiction, that classification is a great improvement and, in spite of all obstacles and individual objectors, has justified its adoption.

RECAPITULATION OF ASSESSMENTS.

Year.	System.	Real Estate.	Personalty.	Total.
1893	General Property tax	421,734,838	144,006,308	568,741,146
1917	General Property tax	713,835,438	208,621,043	922,456,481
1918	Classification tax	870,082,809	712,138,421	1,583,121,230
1919	Classification tax	1,031,080,835	964,922,036	1,996,002,871
	Increase in 25 years under the General Property tax	289,100,600	64,614,735	353,715,345
	Increase in 2 years under the Classification tax	317,245,397	756,300,993	1,073,546,390

These periods 1893-1917 and 1918-1919, under the old and new laws, indicate a fairer distribution of the burden as between real estate and personal property, and had it not been for the fact that real estate in Kentucky was notoriously undervalued in assessments and had to be increased, in accordance with the old law, the proportionate increase in personal property would have been greater. While real estate is assessed higher, the tax rate is lower and the increase in taxes on real estate of $198,228 is insignificant compared with the increase in taxes paid by personal property of $1,863,526 under the classification plan, without which there must have been an additional burden on real estate, in increased assessments and higher tax rates and which was only obviated by inducing personalty to share it, which had been found to be impracticable under the uniform tax law.

EXEMPTIONS UNDER THE FEDERAL INCOME TAX

RUFUS S. TUCKER

Exemptions under the Federal Income Tax are generally speaking of four kinds: those granted for purely fiscal or administrative reasons; those granted on constitutional grounds; those granted to certain persons for reasons of public welfare; and those the purpose of which is to assist certain kinds of enterprise or to encourage certain forms of investment, presumably also on account of their effect on public welfare.

The first kind, the fiscal or administrative exemptions, may be further divided into deductions necessary to ascertain and tax true or net income only; and, secondly, exemptions or credits required to avoid double taxation; either under various provisions of the income tax law or in consequence of other existing tax laws. The former include deductions for expenses, losses, interest, taxes, depreciation, etc. An interesting point in connection with these deductions, and one open to criticism, is that interest may be deducted for money borrowed to purchase Liberty bonds, although the income from the bonds is exempt from the normal tax and also, to a great extent, from the surtax. This provision presumably made it easier to float the Liberty loans, but there is reason to believe it also assisted the great rise in prices that has taken place to our sorrow, for it certainly had a tendency to increase bank deposits, and bank deposits are pretty closely connected with prices.

The exemption of the proceeds of insurance policies is due to the fact that these are regarded as returns of one's principal rather than interest. The most important example of a deduction or "credit" intended to avoid double taxation is that of income received by individuals as dividends on the stock of corporations subject to the corporation income tax. These dividends are exempt from the normal income tax; but in the case of personal service corporations and perhaps some others, the corporation is exempt but the shareholder or member has to pay on his part of the profits.

Another deduction resulting from the same principle is that of inheritances, which are separately taxed.

Coming to the second main division of exemptions — those granted for constitutional grounds—we find that these include interest from state or municipal obligations, and the salaries of state and municipal employees. Marshall's dictum that "the power to tax is the power to destroy", although originally uttered with reference to an attempt by some of the states to destroy a federal agency by means of a discriminating tax, has been invoked to prevent what was alleged to be a federal restriction of state sovereignty as an incidental result of a uniform tax. The cases in which this point has been passed upon by the Supreme Court were decided before the 16th amendment was adopted, so it is not necessary to question their decision; although it would seem that from the economic point of view at least there is an immense difference, of kind rather than of degree, between a tax that might discriminate against states in their attempts to borrow money or hire employees, and a tax which simply puts them on the same footing as other borrowers and employees, or in other words leaves them in the same situation that they would have been in if no income tax had been imposed at all. Moreover, states are not forbidden to tax the bonds of other states if held by their own citizens. The 16th amendment gives Congress power to levy taxes on income "from whatever source derived". It is true that many lawyers think this not enough to do away with the exemptions on state-derived incomes, but there are other changes in the situation that must be taken into account; they are the change in the attitude of the public toward the principle of a federal income tax, and the change in the personnel of the Supreme Court. The income tax was widely regarded in the nineties as a dangerously socialistic device; and the judiciary could not escape this feeling. In some sections of the country also at that time the principle of state's rights

was still held in an exaggerated form. Moreover, the legal profession was absolutely bound by the principle of precedents. That public opinion has changed is a matter of common knowledge; and recent decisions of the Supreme Court have shown that some at least of the Justices believe that law, like other sciences, is capable of progress.

One bad effect of this exemption of state and municipal securities will be to encourage states and municipalities to enter on expensive undertakings involving much borrowed capital. Unless one is confident that the states can manage enterprises better than private persons can, he will hardly look with favor on such a result. Another result will be that states will be asked to lend their credit to assist private schemes on account of the low rate of interest on their bonds. Now it is one thing to enjoy a low rate of interest because of a good reputation; it is another, and quite different, thing to enjoy a low rate of interest because of tax exemptions. In the first case the saving in interest is net; it is a real saving; investors are willing to lend at a low rate because it is a good investment. In the second it is offset by the higher taxes that everyone else has to pay to carry on the government, and under a system of progressive rates the loss in taxes is bound to be much greater than the gain in interest. But I will recur to this later.

The amount of state and municipal securities withdrawn from the Federal income tax is at least $4,000,000,000, representing an annual income of probably $160,000,000. There are also the salaries of state employees, the amount of which cannot be ascertained. The Revenue Act of 1918 did omit the specific exemption of salaries of state employees, but the Treasury Department has interpreted the clause in such a way as to exempt them nevertheless.

Next in order are the personal exemptions deliberately granted for reasons of public welfare. The exemption of $1,000 for unmarried and $2,000 for married persons is justifiable, like the progressive rates on higher incomes, on the ground of inability of these smaller incomes to pay a direct tax. It would be erroneous to assume that persons receiving such low incomes cannot pay any tax at all; other countries have much lower exemptions, and even here these persons are not exempted from the customs duties nor from other internal revenue taxes, to say nothing of state property taxes. In Prussia, for example, the limit of exemption before the war was $220, and no European country had as high an exemption as $1,000. In fact, our first income tax, in 1862, permitted an exemption of only $600. But if for no other reason, the exemption of $1,000 is justified by the expense of collecting the tax on smaller amounts. On the other hand, a larger exemption would create too large a class of citizens who would not knowingly contribute to the cost of government.

Under the peculiar wording of this part of the act, it is sometimes possible for a person with one dependent, other than a wife or husband, to get an exemption of $2,200, although the exemption for a married person with a dependent wife or husband would be only $2,000. Another peculiarity is that a man with over fifteen dependents might be exempt from normal tax while subject to the surtax. These points, however, are of minor importance, and are mentioned only as curiosities.

But the most disputable exemptions are those which are really concealed subsidies. In this class belong the exemptions of incomes from certain securities, such as United States bonds, or the bonds of territories and possessions of the United States, Farm Loan bonds, and other securities issued in connection with the system of agricultural credit, and bonds of the War Finance Corporation. Here also belong the exemptions of incomes received by certain organizations not primarily for profit, including labor organizations, fraternal societies, religious, charitable, and educational bodies, social clubs, etc. This sort of organization has usually been exempt from property taxes under the laws of the states. There are also some associations organized for the pecuniary benefit of their members which have seemed deserving of encouragement, such as building and loan associations, local mutual insurance companies, and cooperative marketing associations. It is harder to justify these exemptions than those mentioned just previously, but after all they are not of much importance. The amount of tax thus lost is small, and it is not easy for ordinary citi-

zens to evade their proper share of taxes by taking advantage of these exemptions.

The case is different with respect to the exemptions of income from securities. Mr. K. N. Robins has estimated that the par value of exempt securities is over $30,000,000,000, including the state and municipal issues previously mentioned. The income from such investments, all exempt from the normal tax and mostly exempt from the surtax, would be about $1,200,000,000, or one-fifteenth of the total taxable income reported for the year 1917. This means that taxable incomes have to pay a tax one-fifteenth greater than is required for the costs of government, in order that certain political bodies and other organizations may borrow money at slightly less than the market rate, and that certain wealthy lenders may enjoy their incomes free of most of the existing income tax and all future increases in rate that may take place. It is somewhat difficult to justify taxing all citizens more in order that farmers or governments may borrow money more easily, but if the farmers or the states or the United States government actually saved what the citizens lost, it would not be so bad. It is plain, however, that tax exemption does not ordinarily enable a saving of more than one or two per cent in interest; a security that would normally sell on a 7% basis would certainly not sell at less than 4⅓%. There is a saving of one-third, and this is a very extreme case. But if the lender's income is over $90,000, the government loses more in taxes than the amount of the saving in interest. When the Victory loan was floated, 4¾% taxable notes and 3¾% non-taxable were sold at the same price. To the extent that they are held by individuals whose income is in excess of $40,000, the loss to the government in tax is greater than the saving in interest. Looked at in another way, tax-exempt 3½% Liberty bonds yield only 3¾% to a man of moderate means, but nearly 12% to a man with a million-dollar income; that is, the amount of income actually left in his hands is nearly as great as that from a non exempt security yielding 12%. No wonder that the 3½'s sell for a higher price than the other issues, which do not carry such complete exemption. The result is a concentration of non-taxable property in the hands of the wealthy, and the creation of a class of citizens who receive the benefits of our government without contributing their proper share to the cost. If progressive tax rates are just—and most Americans think they are—it is unwise to provide such an easy means of evasion; and it is unjust, also, because of the fact that this means of evasion is only open to those who derive their income from property, not to those who receive salaries or business profits. Ordinarily it is considered proper to tax the so-called "unearned" incomes at a higher rate than the "earned" ones. The United States government is actually doing the opposite, by providing means of escape for the recipients of unearned incomes, while no escape is open for the others. There may have been good reasons during the war for issuing government securities at a low rate of interest by means of tax-exemptions; there are none for continuing the policy in times of peace.

The time has come when the whole question of exemptions has got to be thrashed out, and a definite policy adopted. Many worthy and even necessary industries are unable to obtain capital because of the unfair competition of tax-exempt investments. It is enough to mention export trade, building, and the railroads. The representatives of these industries naturally ask that their securities receive the same privileges that farm loans and municipal enterprises are receiving. Would it not be better to restore the equilibrium by abolishing exemptions rather than extending them? This will be made easier by the fact that a large part of the exemptions attached to the $20,000,000,000 of United States bonds outstanding will expire under existing laws within five years. On the other hand, if exemptions are extended we will have a repetition of the situation existing in France before the Revolution — a class of wealthy persons paying practically no taxes while the poor struggled in vain to support the crushing weight of the cost of government; and such a situation would be very likely to lead to a similar result.

COST PROBLEMS OF TRACTION SYSTEMS AND THEIR SOLUTION

ZENAS W. BLISS

An address delivered at the eighth annual conference of the New England Tax Officials' Association, December 5, 1919

Generalization, in the subject assigned to me, is practically impossible. Each traction system presents a problem or series of problems the solution or solutions of which are always, and almost entirely, dependent upon purely local conditions peculiar in a greater or less degree to itself. What is sauce for the traction goose is not necessarily sauce for the traction gander.

The fact that practically all of our traction systems are in financial straits, naturally suggests some fundamental difficulty besetting all alike, and which if discovered and removed would cure the whole situation. For some time I was inclined to this way of thinking myself, but I am no longer of that opinion. The trouble seems to me to be due to a number of different causes, each acting with greater or less force in individual cases, the composite result being a general and practically complete financial collapse of the traction properties throughout the country.

To attempt to list for you all of the various causes which have combined to bring about the unsatisfactory financial condition of our traction systems, would be tedious and unprofitable, but there are several causes which are of sufficient importance and operate in such a number of cases over a wide area, to be considered as generally affecting seriously the situation as a whole:—

Increased cost of operation, competition, public regulation, public opinion, taxation, and inadequacy of gross revenue seem at least to be very common symptoms of the widespread malady. These, as I have said, are by no means all, but they seem to occur with more or less effect in most cases.

There are some who claim that our present traction systems are obsolete and must go the way of the ox-cart, horse-drawn vehicles and the bicycle. If one takes this view of the situation, the solution is, of course, nothing but the junk-heap. I shall not attempt to argue this point, but will simply state that it is my opinion, that over a large part of our country the present transportation system is a necessity and cannot be satisfactorily replaced at present, or in the near future, and that the solution of our problem is not to be found in a new system of transportation, but in adapting ourselves and our existing system to the new conditions which confront us. It is possible, of course, that the former view may be correct; that adequate, satisfactory and cheaper transportation can be furnished by other means than our existing traction systems. Even so, a very grave question arises as to whether or not it is better on the whole to make the transition abruptly with the enormous incidental destruction of values, or gradually, thereby reducing to a considerable extent at least the ultimate loss.

My subject is: Cost Problems of Traction Systems and their Solution. The preceding is intended to indicate that, even supposing we should solve the cost problem as ordinarily understood, that would be only a part of the solution—a very important part — but not the whole by any means.

The principal differences between the cost problems of traction systems and ordinary business concerns is, that their rates are regulated not entirely by economic conditions, but by law; and that continuity of service is imperative. Economic conditions must, of course, operate and determine rates in the end if the traction system is to survive, but adjustments by rate-making bodies are long drawn out, slow, often the result of compromise; are usually subject to review, stay, or they may be set aside, requiring the whole matter to be gone over again *de novo*.

The mills of the gods grind slowly, some more so than others, and when a traction system is transporting passengers at less than cost, the celerity with which economic effects are produced is in marked

contrast to the operation of the rate-making authority. This is not a complaint; it is merely the statement of a fact. The public utility commissions have done their best to save the situation, and certainly without them it would have been decidedly worse than it is. They have tried to educate the public, and to set out for it conditions as they are. Again and again they have given warnings to no purpose. Slight attention has been paid to them; public support has been conspicuous by its absence, and they have been left to their own devices in struggling with one of the most difficult and important of our present social, political, and economic problems. They may well be excused if they make a pessimistic application of the quotation, "Virtue is its own reward". They have been a voice crying in the wilderness. Their warnings were disregarded by railway officials and the public alike. Even establishment of utility commissions was uniformly opposed by the traction companies, and now they are their main, if not their sole reliance; for, in my opinion, upon the sound judgment and integrity of these bodies largely depends the solution of the whole traction problem.

The fact that rates are determined by public authority, places the utility in a class by itself, and it seems to me that rate-fixing, or indeed any public regulation, carries with it certain collateral responsibilities on the part of the regulating authority. To fix a rate is not sufficient in itself. There should be other powers granted and exercised which would enable the utility to operate at the rate fixed. Likewise, to order certain cars to travel upon a certain street or highway is unfair, or even ridiculous, unless there is also authority to clear the streets so that the cars can operate as directed. Thus, one thing leads to another, and the logical result is direct, positive regulation in all respects, rates, time-tables, routing, return on capital and the natural, and in fact necessary, concomitant of this kind of regulation is guaranteed wages and guaranteed return on capital. There are, to my mind, two methods worthy of consideration, regulation with guarantees, and public ownership outright.

I personally incline decidedly to the first of these methods, but in either case the cost problem becomes a matter of public concern, because that must be the principal factor determining the price exacted for transportation. Whether it is all to be paid by the passenger or not is another question, and my experience leads me to the conclusion that that will be settled on political rather than on economic grounds, temporarily at least. It must be thoroughly understood by the public, both traveling and otherwise, that transportation will not, indeed it cannot, be furnished at less than cost for any length of time.

For many years the passenger was taxed for the benefit of the general public. He will now retaliate so far as possible and make the public pay as much of his fare as he can. As he is both numerous and vociferous, his chances for success seem fairly good. Under the condition of continued operation of our traction systems, somebody must pay the cost of transportation, the passenger either cannot or will not; so the question of cost, now much more than formerly, becomes a matter of public concern, and must receive careful consideration and be thoroughly understood by those who are so vitally affected if the best results are to be obtained.

The minimum cost of transportation may be conveniently divided into four elements: wages, supplies, renewals, and return on capital. There is no need, I think, to argue the necessity to provide these four elements if operation is to be maintained, even temporarily. I assume, of course, that you are all aware that certain philosophers deny the necessity of the last, that is, return on capital, and if we admit their premises, that is indeed unnecessary; but assuming that we are to be economically sane, wages, supplies, renewals, and return on capital are necessary to operation, and represent the minimum cost.

There is not much difficulty so far, except with regard to renewals. Replacing a rail or tie here and there, a new car once in a while, a brake, shoe, or some paint or varnish, are all well enough. The necessity for these is easily recognized and understood, but there are great prime-movers, —boilers, buildings and bridges—all subject to the wear incident to use, and the destructive effect of time and the elements. Their replacement is required only at comparatively long intervals, but means the expenditure of vast sums of money. The

question of obsolescence also arises. These conditions must be met, and must be provided for by a replacement reserve, unless the ultimate capital expenditure is to increase indefinitely, or in other words, unless we capitalize the depreciation and the future is to pay for a part of present transportation. It appears, therefore, that in addition to the above four elements, there should be added a depreciation reserve which covers the actual depreciation, as well as the day-to-day renewals, and to my mind, should go somewhat farther as a matter of safety, and this should be considered as an operating expense.

Such transportation as we are considering—urban traction systems and the street railroad—should, it seems to me, within its particular field of activity, be a monopoly, with certain modifications. Competition would not necessarily reduce the cost to the passenger; in all probability it would eventually increase it. Such competition—jitneys and motor busses—as many of our traction companies are now subjected to, is ruinous. It means the destruction of vast, perfectly legitimate values; the disruption of well-ordered transportation; ultimate inconvenience and great unnecessary expense and financial loss. Certainly, if we are to undergo an entire change in our urban and inter-urban transportation system, it should be accomplished under the watchful eyes of representatives of the people, and so safeguarded that we shall not find ourselves under the necessity of altering our whole social and economic life so far as the distribution of manufacturing and mercantile business is concerned, and be faced with the problems of congestion and slums, or be obliged to rebuild or rejuvenate at great expense a prematurely and thoughtlessly discarded system of transportation. Certainly, nobody will deny that comfortable, convenient, and cheap transportation is greatly to be desired, if not an absolute necessity under modern conditions; therefore, the cost, not the immediate, but the ultimate cost, is of paramount public importance. Convenience and speed are mere matters of detail and easier of solution. The question at issue between the rival systems—busses and jitneys on the one hand and trolleys on the other—is reduced to reliability and cost; one probably having the advantage in speed, the other in convenience.

If the traction companies are to survive and render the best service for the lowest cost, they must be granted a virtual monopoly, and be subject to full and direct regulation by the state as to rates of fare, return on capital, fixing of wage scales and working conditions; and provision must be made for a proper depreciation reserve as one of the costs of operation. If we are to have some other form of transportation — busses, jitneys or something else—monopoly still seems a necessity and full regulation as well. The experience of so many communities widely separated and under various conditions, indicates unmistakably to me at least that such an important function in our social and economic life as urban transportation cannot safely be left to the uncontrolled dictates of any body of men, whether capitalists, laborers or anybody else not directly responsible to the public. Regardless of the merits of the case which may be in dispute, it is intolerable that a whole community should suffer inconvenience and great economic loss because of a disagreement of some kind between a number of individuals, an inconsiderable minority as compared with the community.

If we assume that wages, supplies, renewals, and return on capital are to be provided for and a proper replacement reserve built up, as the only means of insuring reliable and adequate transportation facilities, we are then confronted with the question of how to obtain sufficient revenue to meet these expenses which seem to represent the minimum cost.

In most cases there are other expenses imposed upon the traction systems, taxes upon property and franchises, also obligations to build or maintain streets or parts of them.

If a reasonable fare would provide the funds necessary to meet the obligations and the traveling public would pay the reasonable fare, there would be no problem. The cost of everything which goes into the furnishing of transportation has increased except the return on capital already invested, that from necessity remains nominally the same, and if that could be obtained, there would be a wave of general satisfaction over the land.

It is safe to say that the cost of transportation has at least doubled within recent years, and the only way immediately available to meet the increased cost was an

increase in the rate of fare charged. Now if the passenger would ride as he did before, and pay ten cents instead of five, the problem would be solved, or at least we should be no worse off than we were in 1914.

I am assuming the reduction in the purchasing power of the dollar as 50%, and I am sure that those of you who receive from your state a monthly stipend, dignified by the name of salary, will agree with me that it is at least that much.

The trouble is that notwithstanding the more than proportionate increased cost of almost everything else, people refuse to ride at anything like the same increase in fare. They walk; they use their own or somebody's else automobile; they move nearer the centers of population to reduce the number of fare zones traveled. Competition develops, inadequate and unreliable perhaps, but it is patronized so far as possible, and this results in a falling-off of revenue for the trolleys, and this falling-off may be, and I think usually is, in the most profitable business. Whether it is actually true or not, there is a feeling that the rate charged is more than the ride is worth, and it is objected to. There is no particular profit in attributing the whole matter to the psychology of the passenger or to say that a man who now gets twice as many dollars a week as he used to should not object to paying twice as much for a ride as he did. The fact remains that in large numbers they refuse to pay it. The utmost that can be done is to make the rate all the traffic will bear; that is, so fix the rate that the largest ratio will be maintained between receipts and the cost of transportation. That results in a considerable loss of traffic, and even then may not pay the legitimate cost of transportation. The question then leaves the field of pure finance and becomes one of public policy, whether it is better for the state to step in and pay a part of the cost or to submit to inadequate transportation, congestion, sociological changes and economic disturbance.

Assuming that the cost of transportation must be met and that the rate of fare cannot be adjusted to accomplish the purpose, and that it is advisable or necessary to keep the existing system in operation, the following remedies should be applied in the order stated, to reduce the cost of transportation to the minimum: relief from paving and other obligations incident to the use of streets and highways except the care and maintenance of such parts as are actually worn out by the operations; relief from municipal franchise taxes or other municipal taxes on intangibles, state franchise taxes or other state taxes on income or intangibles, tangible personalty, and finally taxes upon real estate. If this is not sufficient, some form of subsidy must be resorted to. It appears to me that there is considerable to be said in favor of subsidizing without the removal of the real estate tax, particularly if the system is inter-urban and the subsidy is from the state. Under such a system of taxation and such a traction system as we have in Rhode Island, for instance, I am in favor of this method.

There is, of course, substantial argument in favor of subsidy without relief from any taxes, because relief from taxation is in reality a form of subsidy, and its full effect and nature would not be appreciated or understood by the public generally, but everyone would appreciate and understand the payment of a direct subsidy, and realize what the public was contributing. I cannot, however, agree with this line of reasoning, except as applied to real estate taxes, and in some instances tangible personalty taxes. A transportation system which, in order to meet the minimum cost of transportation, is obliged to resort to a rate of fare based upon all the traffic will bear, should not pay any franchise taxes. It should not be charged for the privilege of operating under such conditions. It is not worth anything. I question, under such circumstances, the advisability of taking money out of one pocket and putting it into another simply for effect on the public; that method is quite as likely to be misunderstood as the other and seems to me to be fraught with more danger and to make the equitable distribution of the subsidy payment among the several municipalities, if that is desired or is necessary, more difficult.

The question of properly distributing subsidy payments among the communities served is a problem in itself which does not come within the scope of these remarks. I will say, however, that unless the question is a strictly urban proposition, that is, if only one municipality is in-

terested, the subsidy should be paid by the state. If it is deemed advisable, distribution may be made later.

There is, of course, the other side to the cost problem, — the question of raising sufficient revenue to pay the minimum cost of operation may be transferred from the transportation system to the state, and municipalities. The large amount of taxes paid by the traction companies, and their contributions towards building and maintaining streets, highways, and bridges, and the numerous other contributions direct and indirect when no longer available, will leave a considerable shortage in the public revenue, and this, of course, must be made good and the additional funds for subsidies, if required, must be obtained.

I shall not, at this time at any rate, attempt to answer these questions; it certainly presents another serious problem for the taxing authorities, and emphasizes the necessity, caused by constantly increasing demands for new revenue, of a just and equitable distribution of the tax burden, the imperative need of good laws, sound theory and excellent practice in the assessment and collection of taxes, if the situation is to be properly dealt with.

TRICKS OF TAXATION UNDER NEW JERSEY INHERITANCE TAX ACT

SUPREME COURT SANCTIONS MAGICAL MATHEMATICAL FORMULA

PRINCIPLE OF AGGREGATION APPROVED

JOSEPH F. McCLOY
Of the New York Bar

The Supreme Court of the United States, at October Term, 1919, rendered a decision of great moment and of far-reaching implications, upon review of the New Jersey inheritance transfer tax act. The constitutionality of the act was questioned in connection with the taxes on the estates of the late James J. Hill and James McDonald, both of whom were non-residents of New Jersey. The court divided five to four in favor of the constitutionality of the statute. The prevailing opinion by Mr. Justice Day was concurred in by Mr. Justice McKenna, Mr. Justice Brandeis, Mr. Justice Clark and Mr. Justice Pitney, and the dissenting opinion, delivered by Mr. Justice Holmes, was concurred in by Chief Justice White, Mr. Justice Van Devanter and Mr. Justice McReynolds.

Among the assets of deceased, in both cases, were taxables under the inheritance tax law of New Jersey.

Taxables under the New Jersey statute in case of non-residents were specifically, (a) real property or goods, wares and merchandise within the state of New Jersey, or (b) shares of stock of corporations of New Jersey, or (c) shares of stock in national banking associations located in that state. All other assets, if any, of non-residents were omitted from the taxables as defined. The taxables in case of residents were any property generally, real or personal, within the jurisdiction of the state.

It is thus evident that the statute in question, on its face, especially favors the non-resident estate by forbearing to tax certain *imponderabilia* of non-resident estates which the legislature had the power to tax, notably, money on deposit in the state, credits located there, bonds, etc. Nothing which could be taxed in the case of residents was omitted from the taxables. The motives for this forbearance in the case of non-residents, need not perhaps be inquired into inasmuch as the court did not go so far as to say that it made for equality in the statute which otherwise might be said to be lacking. The advantages to New Jersey of attracting deposits and business of its near neighbors, free from the tax, is quite obvious, while at the same time such property of non-residents farther off was likely to be inconsequential.

The exemptions, graduations and rates

applicable under the statute were: The first $5,000 passing to the widow or children, exempt; the next $45,000 taxable at 1 per cent; the next $100,000 taxable at 1½ per cent; the next $100,000 taxable at 2 per cent; all sums above the aggregate foregoing were taxable at 3 per cent.

The exemptions, graduations and rates applied under the terms of the statute to the singular succession in both resident and non-resident estates, but the special method of ascertaining the tax upon non-resident estates was that provided for by the following magical mathematical formula:

"A tax shall be assessed on the transfer of property made subject to tax as aforesaid, in this State of a non-resident decedent if all or any part of the estate of such decedent, wherever situated, shall pass to the persons or corporations taxable under this act, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this act if such non-resident decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated; provided that nothing in this clause contained shall apply to a specific bequest or devise of any property in this State."

It will be noted that the above formula applied *only to estates of non-residents*, and it was claimed on behalf of non-residents that unreasonable discrimination against them was thereby occasioned, and that the classification involved in the operation of the formula was unreasonable in that it had no relation to the succession tax upon the property over which the state of New Jersey exercised dominion, in case the deceased owners were non-residents of that state. In a word, New Jersey sought to reap where she had not sown.

Counsel for plaintiffs in error in the Hill and McDonald estates sum up their objections to the statute, based on the Federal Constitution, as follows:

"(1) It taxes the estates of non-residents more than those of residents, and therefore gives to residents privileges and immunities denied to non-residents.

"(2) It provides for a tax which bears unequally, and therefore is not imposed upon a uniform rule, and it therefore denies to non-residents the equal protection of the laws.

"(3) It taxes the transfer of a non-resident's property over which the state of New Jersey has no jurisdiction while it expressly omits like property of residents, that is, real estate without the state, and thereby deprives the non-resident of his property without due process of law."

A point was also made of the further discrimination, by reason of the *proviso* of the formula, between those taking by general bequest or devise from a non-resident and those taking by specific bequest or devise from a non-resident, and also those taking in either manner from a resident.

In the Hill case the entire estate transferred, wheresoever situated, real and personal (including real estate located in Minnesota and New York, valued at $1,885,120.00) aggregated $53,814,762.00 gross, of which 4.30654% or $2,284,939.00 net was taxable in New Jersey. Hill died intestate, leaving a widow and nine children, the widow being entitled to one-third and the nine children being entitled to two twenty-sevenths (2/27) each. The Comptroller computed the tax under the formula at $67,019.36. Hill's administrator contended that the tax should be computed without regard to the formula, at $40,315.31. The difference in result arising upon these methods of computation was $26,703.12.

In the McDonald Estate, where similar computations were made and contended for, the difference amounted to $7,414.20.

The Supreme Court, disposing of the cases in question, held that none of the objections of the plaintiffs in error were valid, saying:

"The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law.

"In our opinion, there are substantial differences which within the rule settled by this court permit the classification which has been accomplished by this statute. St. Louis Southern Railway Company vs. Arkansas, 235 U. S. 350, 367, and cases cited."

Mr. Justice Holmes, without beating about the bush, said with characteristic lucidity, in dissent:

"Many things that a Legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power. That I understand to be the principle of Western Union Telegraph Company vs. Kansas; Pullman Co. vs. Kansas and other cases in 216 U. S.; Western Union Telegraph Co. vs. Foster, 247 U. S. 105, 114. New Jersey cannot

tax the property of Hill or McDonald outside the State and cannot use her power over property within it to accomplish by indirection what she cannot do directly. It seems to me that that is what she is trying to do, and therefore that the judgment of the Court of Errors and Appeals should be reversed."

The advantage accruing to both the state of New Jersey and her residents by the operation of the ingenious device in question is apparent, once it is realized that every non-resident estate, no matter how little the value of its taxables, under the act must thereby produce a tax, providing the total value of the assets, wheresoever located, exceeds the aggregate of exemptions accorded under the statute. On the other hand, if the assets of the estate of the resident decedent, wheresoever located, include real property beyond the boundary of the domiciliary state but do not exceed in value of *taxables* the aggregate of exemptions, no matter what the value of the entire estate, even if extending to millions, no tax is collectible under the statute.

While it was claimed that the operation of the prescribed formula was based upon arbitrary classification and produced inequalities to the detriment of *non-residents,* it cannot be gainsaid that in the absence of some such formula, estates of *residents* were likely to be subjected to greater proportionate taxation in comparison with estates of non-residents. It is quite true that there are and must be inequalities resulting from laying taxes of this character equally upon estates of residents and non-residents alike, by the terms of one and the same statute. Heretofore it has been considered necessary to treat taxable estates of residents and non-residents alike, although the relationship which the respective deceased persons in such cases sustained to the taxing state was essentially different.

This principle was recognized in a recent case (*Yale & Towne Mfg. Co.* vs. *Travis,* Comptroller of the state of New York) by Mr. Justice Knox, who, quoting from the XIV Amendment to the Constitution of the United States, declared:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, and no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

"It is this provision of the Constitution along with the Second Section of Article IV and the Interstate Commerce Section of our fundamental law that have been largely responsible for the community of interest, the unanimity of purpose, the united effort and the magnificent accomplishment of our people. If now, under one pretense or another, the States are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various States will for all practical purposes be burdened with the disability of alienage, and this would be intolerable."

Mr. Justice Field in his opinion in *Paul* vs. *Virginia* (8 Wall. 168) says, referring to Article IV of the federal constitution (p. 180):

"Indeed without some provision of the kind removing from the citizens of each State the disability of alienage in other States and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

These pages need not be burdened with consideration of the question which will undoubtedly arise in the case of a non-resident alien entitled to rights by treaty whose estate consists of taxables under the New Jersey statute. It may be that such an estate will be found to be more favorably situated than that of a deceased citizen of the United States resident of New York, and if not it will be a poor rule if it does not work both ways.

The inequalities which are apt to exist in the imposition of taxes of this character to the detriment of the resident estate were heretofore considered to be inherent and fundamentally justifiable by reason of the different relationship of the deceased owners of this property, the transfer of which was taxable. These natural inequalities which are apt to operate against the estates of resident decedents, without the aid of such a formula as the one questioned, were likely to be redressed, however, when deceased residents of New Jersey owned property located in other states which received the same benefits there as the property of deceased non-residents in New Jersey.

The fact is that the taxables in the estate of the resident are apt to coincide in value with the entire assets or larger fraction thereof inasmuch as the only property which would *not* be subjected to the jurisdiction of the domiciliary taxing authorities would be real property beyond the

taxing area, whereas, in the case of the non-resident deceased owner of property, the statutory taxables, even if omitted *imponderabilia* were included therein, would, in the nature of things, be apt to form but a small fraction of the whole estate. Therefore, without the aid of some such formula as the one now judicially sanctioned, in practice the comparatively smaller fractions constituting the taxable property of the non-resident would benefit by the operation of a taxing scheme which applied alike to both kinds of estates. In other words, unless the entire property or estate of the non-resident decedent is within the jurisdiction of the taxing state, it follows that the *constant* or *unit of taxation* in the case of the resident is likely to be of greater value or *content* than in the case of the non-resident, i. e. (disregarding real property beyond the state boundary) the *unit of taxation* is apt to be the whole of the property of the resident decedent but only the *fraction of the whole of the property of the non-resident within the jurisdiction of the statute.*

If the statute, as it does, makes the value of the beneficial interest, or the singular succession, a criterion of variation, the extent of exemption accorded and the rate of tax being in part determined thereby, it follows that unless the entire property or estate of the non-resident decedent is within the jurisdiction of the taxing state the *unit of variation* in the case of the resident is of greater *content* or value than in the case of the non-resident; (disregarding real property beyond the state boundaries) *the unit of variation* is the *whole of the beneficial interest* in the case of the resident decedent but only that *fraction of the whole beneficial interest* in the case of the non-resident decedent, represented by the *fraction of the whole property of the non-resident decedent within the jurisdiction of the statute.* This is so because of the fact that each ultimate beneficiary takes an undivided interest in all the assets of an estate and that no particular portion of such assets passes to any ultimate beneficiary unless specific provision is made to that effect (see *Matter of Ramsdill,* 190 N. Y. 492; *Tilford* vs. *Dickinson,* 79 N. J. L. 302).

Therefore, in most cases under the operation of such statutes *the fractional non-resident estates will slip through the meshes of the net while the whole resident estates will be held and taxed;* and if the meshes are drawn closer for the purpose of preventing the escape of the *units of taxation* of lesser content or value, the resident estates will suffer more proportionately than the non-resident from the more rigorous exactions of a reduced *unit of variation,* as to exemptions and graduations.

For instance, given a statute imposing a tax at the rate of 1 per cent upon successions in the case of residents and non-residents alike, allowing an exemption of $5,000 to both widow and child and assume a non-resident decedent whose total estate is valued at $100,000 of which $10,000 represents property within the jurisdiction of the taxing state, the whole passing to a widow and one child, the total exemption being equal to the total value of the property within the jurisdiction, there should be no tax. On the other hand, an estate of a resident decedent of like value, passing in like manner, would yield a tax of $900, the excess over the exemption of $5,000 to each beneficiary amounting to $90,000 being taxable at 1 per centum (1%). Or if by reason of the greater value of the content of the *unit of taxation* occasioned by larger investments in property having *situs* within the taxing state, the necessarily *glancing* blow inflicted upon successions to such property within the jurisdiction independent of the domicile of the decedent, should not result in exemption as in the case first instanced above; the result in tax will be proportionately less than in the case of the succession where domicile and property coincide. That is to say, if the value of the property of a non-resident decedent within the jurisdiction, is assumed to be $50,000 passing in like circumstances, the tax thereupon should be only $400, whereas the tax upon a like succession to *twice* that amount in case of the resident decedent would be as stated $900, or $100 more than *twice* the amount of tax upon half the value of the non-resident succession. Furthermore, the *unit of taxation* in the case of the non-resident decedent composed, as it is apt to be, of the fractional part of the property within the jurisdiction, will likely escape free from the incidence of the higher progressive rates to which

the *unit of taxation* in the case of the resident decedent will be subjected.

The sanctioned formula of the New Jersey statute, it is plain, in forcibly redressing the inequality of incidence of tax inherent in difference of domicile has produced an opposite inequality apt to favor her own residents at the expense of residents of other states. In destroying the inequalities above referred to by the establishment of the magic formula, the New Jersey taxing authorities must have lost sight of the fact that her own residents were apt to be enjoying a similar benefit as regarded their property situated in other states which they were bound to lose if those states should take retaliatory measures.

Surprising results may be expected to follow the high sanction earned for the New Jersey formula, in the first place as regards the development of inheritance taxation. With the aid of this device it may be safely assumed that the federal government will soon swell the returns from estates of alien non-residents containing a fractional part in the United States. Retaliatory measures, sure to follow on the part of foreign governments, will add a great burden to American estates carrying investments or real property in other lands.

Formulae involving a similar principle have already been enacted in various of the United States, namely, Connecticut, Kansas, Maine, Mississippi, North Dakota, Oklahoma, Rhode Island, South Dakota, and Wisconsin. Likewise in the Canadian Provinces of Alberta, Manitoba, New Brunswick, North-West Territory, Nova Scotia, Ontario, Quebec and Saskatchewan. In Kansas, North Dakota, Oklahoma, South Dakota, and Wisconsin the formulae employed apply to both resident and non-resident estates alike, and although in the opinion of Justice Holmes such equal application is no justification for the practice, they are therefore free from at least one objection urged against the New Jersey statute.

It is fair to assume that the taxing authorities of all the other states in self-protection will procure the enactment of the New Jersey formula with little delay. What this means in added burdens may be estimated upon the basis of collection of this tax in New York. The New York Comptroller reports estimated revenue from this source for the fiscal year 1918-1919 as approximately $15,000,000; given the New Jersey statute as to non-residents, the New York tax should not be much less than twice that amount.

Under the statute in force until recently in New York, taxing practically only real property of non-residents, the same James J. Hill Estate involved in the litigation with New Jersey was subjected to a tax of $12,541.74 whereas if the New Jersey formula had been in operation in New York the tax would have been $31,119.34, the difference of $18,577.60 representing the loss to New York in one estate valued at $805,136 because of lack of mathematical ability on the part of her taxing authorities.

Under the present New York statute, which is now quite as comprehensive of taxables as that of New Jersey, the increase of tax would be very considerable because of the one fact alone that no non-resident estate, however small the value of property in New York, would escape some tax under the operation of the formula. The like observation applies to other states which impose like transfer tax upon property of non-residents.

No statistics are available upon which the profit accruing to that state under the New Jersey formula can be computed, but it is estimated that it must be at least a million dollars annually out of the total of three or four million dollars collected. If all the other states employ the same formula upon the same taxables as New Jersey, the additional annual burden upon inherited wealth, assuming there be no more than usual evasion, should be not much less than $100,000,000. Of course, the results of the formula may always be avoided in non-resident cases, by making specific bequest or devise of New Jersey taxables if the testator is mindful.

There is little likelihood of evasion of inheritance taxes upon real property of non-residents situated in such a taxing state, unless such property be held under the form of a foreign corporation, and even in that case the Massachusetts courts have looked to the substance of ownership, in disregard of form, and imposed inheritance tax notwithstanding.

Non-residents of New Jersey who own summer homes there and have large hold-

ings of property elsewhere, would do well to become renters instead or remove elsewhere, since ownership subjects them to this exaction. Owners of taxables under the New Jersey statute, informed of the results of the operation of the formula, have learned to carry their holdings of such personal property in the names of their brokers or bankers, thereby entirely avoiding the tax at death in New Jersey and other states as well. The average unthinking investor, of course, will continue to be doubly taxed as heretofore in New Jersey as elsewhere.

The implications of the sanction accorded the formula extending to income taxation are much more far-reaching than is readily realized. The federal income tax production, with the aid of such a formula, would be vastly increased, operating as it would upon a much larger number of subjects. The recently enacted New York income tax act is alleged, by certain residents of New Jersey and Connecticut (*Yale & Towne* case, *supra*) to work unconstitutional discriminations against them. In this claim it is said they are supported, inconsistently enough it would seem, by the New Jersey state officials appearing *amici curiae;* the discriminations complained of in the New York income tax statute would be as nothing in dollars and cents compared to what these taxpayers may expect from the incorporation therein of the magical formula. New Jersey residents whose incomes are partially earned in New York for instance, will pay income tax to the latter state measured upon their income from New Jersey investments. As they save in New Jersey, so shall they pay tax in New York. It will, perhaps, be found to be more painful to the pocketbook to be annually skinned alive than to be skinned once in the shroud. Nor will evasion of the income tax be found quite as simple as in the case of inheritance taxes.

In conclusion, it is regrettable that sanction of the principle of aggregation should rest upon such a narrow margin. It would indeed be rash, under the circumstances, to predict that a similar provision of the statute of another state would fare as well in the same tribunal in the future, or that the principle would be held valid in operation upon successions to property of aliens protected by treaty.

Meanwhile there is nothing to prevent the state of New Jersey so manipulating and adjusting its criteria of taxation (raising its exemptions, etc.) under the inheritance tax act that the average estates of the New Jersey residents shall go scot free of tax and the estate of every non-resident holding taxables to be got at, valued in excess of exemptions, particularly those of large size, shall be held to pay the whole tax or the bulk of it.

Residents of New Jersey, and wherever else a like formula operates, may continue to invest in real property beyond the boundaries of their home state and be secure in the advantage thus gained over their non-resident competitive investors who are so ill-advised as to leave taxables in such states as employ the formula.

This advantage is made clear in the case of a farmer who, being domiciled in the taxing state, owns two farms valued at $5,000 each, one lying within and the other without the state boundaries and devises his entire estate to his widow. Granting an exemption of $5,000, there is no tax. But if the decedent be domiciled in the foreign state, the widow is called upon under the operation of the ratio provision, to pay a succession tax of $25 upon the same farm within the taxing state. The right of succession to the farm within its boundaries is undoubtedly granted by the taxing state. The right of succession to the farm in the foreign state is not. Wherein is the value of the right to succeed to the farm within the state boundaries increased by the value of the right to succeed to the farm beyond? If it is not increased by and in no way dependent upon the value of the farm beyond the state boundaries, why tax in one case and not in the other? And what basis in reason is found for the classification which includes property over which the taxing state has no jurisdiction, as in this case to make or increase a tax upon the transfer of property over which it has such jurisdiction?

The deceased Emperor of Sahara, owning taxables in New Jersey, finds that every grain of sand in the desert over which he holds dominion adds to his estate tax in New Jersey while the estate of a deceased citizen of that state who owned property of equal value therein may own half the world besides and add not one tittle of burden to his heirs.

To say that such classification is based on reason and accomplishes lawful equality is to say that the residents of New Jersey are of a peculiar and superior class apart from those of other states and entitled to more consideration than the citizens of ancient Rome.

The sum and substance of the matter is thus seen to be that the state of New Jersey treats the estate of the deceased resident who owns no real property outside the state and the estate of every deceased non-resident, no matter what or where he owns, alike. The estate of the deceased resident who owned real property outside the state is thus distinctly advantaged by the operation of the formula which has earned such high judicial sanction. The state lines exist only for the benefit of a deceased resident who owned real property outside the state; for all others the state lines are obliterated. The deceased non-resident who during his lifetime imagined that the state of New Jersey would impose no tax upon money deposited in New Jersey banks, or bonds, credits and other *imponderabilia* omitted from the transfer tax statute, was mistaken if he did not take into consideration the operation of the formula applicable to the taxation of his estate after death, for the greater the sum deposited or the greater the value of the property *not* subjected to the tax, the greater the tax upon his taxable estate therein. And the investor in securities classified as taxable under the New Jersey statute, who increased his investments and possessions located elsewhere, did a vain thing, for under the operation of this formula, the greater his possessions beyond the dominion of New Jersey, the greater tax his estate pays therein.

The tax fixed upon the transfer of property over which dominion exists with reference to the aggregation of property over which no jurisdiction can be directly exercised, ceases to be a tax and becomes a mere *ransom*. The same logic which maintains the reasonableness of the classification compelled by the formula applied only to the estates of non-residents, would warrant the inclusion in the same category of even those treasures which might be laid up where neither moth nor rust corrupteth. The plain truth is, and it may just as well be frankly admitted, that principles of logic, law or morals have no place in the construction of modern tax laws. The only safe guide is apt to be "the tax, may it be lawfully laid, but, lawfully or not, the tax."

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

FEDERAL TAXES. — Members who have not done so, would do well to secure a copy of Part II of "Notes on the Revenue Act of 1918", recently issued by the Ways and Means Committee of the House of Representatives. It contains the text of such sections of the various income tax acts, from that of 1909 to that of February 24, 1919, as have been construed by the courts, completed to November, 1919, with well-edited digests of the various decisions of the United States courts on such sections. The pamphlet consists of 132 pages, well indexed, and contains a complete table of cases alphabetically arranged. This pamphlet will be found of very great convenience to those who have occasion to pass upon the construction of the federal internal revenue laws.

INCOME AND CORPORATION EXCISE TAXES — INSURANCE COMPANIES — DEPARTMENTAL REGULATIONS—INCOME RECEIVED—RELEASED RESERVES AS INCOME —REVIEW — AMENDED RETURNS. — The United States supreme court, in deciding a case arising under the corporation excise act of 1909 and the income tax act of 1913, has disposed of questions mainly affecting those acts but which are nevertheless of some general interest under the existing tax law.

The case was that of an insurance company and the questions decided were as follows: The claimant company contended that under both acts only premiums actually received by it during any year were to be considered income for that year and excluded premiums paid to its agents or

in course of collection but not remitted. The government contended that premiums on all policies written during the year should be included. The court of claims held that premiums actually received either by the company or by its agents should be included, excluding uncollected premiums. The court upheld this contention, finding that the 1909 act specifically limited income to that *received* during the year, and that while paragraph (a) of section G of the 1913 act contained the words "arising or accruing", paragraph (b), providing for deductions, described gross income as that *"received"* within the year, citing *So. Pac. Co.* v. *Lowe,* 247 U. S. 330, 335; that the words "received by it" under their generally accepted meaning, included income received by an agent.

Further controversy arose over the construction of that provision of the acts permitting insurance companies to deduct the net additions required by law to be made within the year to reserve funds. The government had allowed certain items under this provision but rejected others, among them "loss claims reserves." The court of claims held that this should be allowed, which the court sustained as it appeared required by the regulations of the Pennsylvania Insurance Department. The court of claims had rejected the deductions of reserves for unpaid taxes, salaries, brokerage and reinsurance due other companies because not required by express statutory provision but merely by regulations of state insurance departments. The court held this view erroneous and that it was settled by many recent decisions that a departmental regulation reasonably adapted to the enforcement of an act of Congress, has the force and effect of law if not in conflict with express statutory provision (*U. S.* v. *Grimaud,* 220 U. S. 506; *Do* v. *Birdsall,* 233 U. S. 223, 231; *Do* v. *Smull,* 236 U. S. 405, 409, 411; *Do* v. *Morehead,* 243 U. S. 607) and that the law is no different with respect to the rules and regulations of a department of a state government. However the court, upon examination of the regulations of state departments claimed to authorize the allowances, found that these regulations referred to reserves in the non-technical sense as eqivalent to assets; that the term as used in the acts in question did not embrace reserves to cover ordinary running expenses which must be currently paid out of income, such as taxes, salaries, reinsurance and unpaid brokerage, and the judgment of the court of claims in rejecting these items was approved on this ground.

A further question arose from the fact that in the year 1913 the reserves required were less than those of the previous year, by reason of which the government claimed that for this year the amount of the net deduction should be considered as released or freed from its character as a reserve item, and treated as income for the year. The court of claims adopted this view and the court conceded that if, as a matter of fact, it were shown that the net decrease arose from excessive reserves set up in the preceding year and deducted in that year, and if in fact such excess was released in the following year as free assets, it could properly be treated as income. But it held that there was no definite showing that such was actually the case, that such restoration could only be made when it was clearly shown that subsequent business conditions have released the reserves in question to the free beneficial use of the company, "in a real and not in a mere bookkeeping sense." The holding of the court of claims was therefore reversed on this point.

The final question related to the running of the statute of limitations. The claimant paid its taxes for all the years, made no claim for refund until April, 1915, when it made a general claim which was rejected subsequent to the commencement of suit, which was brought in February, 1916. The government claimed the case barred as to all years but 1913, by R. S. 3226, 3227, 3228. The court held the claimant plainly barred by its failure to appeal to the Commissioner under R. S. 3226, which it held fundamental (*Kings Co. Sav. Inst'n* v. *Blair,* 116 U. S. 200), and also by its failure to institute suit within two years after the cause of action accrued (R. S. 3227). But the claimant contended that the filing of amended returns by the Commissioner had the effect of making new assessments which rendered the appeals taken within time, under *Cheatham* v. *U. S.,* 92 U. S. 85. The court readily rejected this contention, holding that the amended returns had the purpose and effect of merely increasing the taxes, previous payments being credited, thus ren-

dering the *Cheatham* case clearly inapplicable. — *Maryland Casualty Co.* v. *U. S.*, U. S. Sup. Ct., Jan. 12, 1919; see also N. T. A. BULLETIN, II, 202.

"TAX FREE" CONTRACTS — LEASE—COVENANT TO PAY FEDERAL TAXES.—The Pennsylvania supreme court holds that a lease of a street railway made long prior to the enactment of the federal income and excess profits tax laws, containing a covenant by which the lessee agreed to "pay all taxes, charges and assessments now or hereafter lawfully imposed upon [lessor] or for which [lessor] would otherwise in any wise be liable or chargeable on account of its . . . earnings . . . or profits," is amply sufficient to require lessee to pay both the federal income tax and the excess profits tax imposed upon lessor based upon the rental payments, holding the case ruled by the case of *No. Penn. R. R. Co.* v. *P. & R. Ry. Co.*, 95 Atl. 100.— *Phil'a City Pass. Ry. Co.* v. *Phil'a Rapid Transit Co.*, 107 Atl. 329.

INCOME TAX — "TAX FREE" RENTAL CONTRACTS. — The Pennsylvania supreme court has affirmed the judgment of the district court in holding that a covenant by a lessee to pay "all taxes . . . assessed on the said real estate, franchises, stock, dividends, earnings and license fees on each car," does not include liability to pay federal income and excess profits tax assessed against lessor. — *Cont. Pass. Ry. Co.* v. *Phil'a R. T. Co.*, 107 Atl. 390. See N. T. A. BULL., IV, 103; see also *Green & Coates Sts. Phil'a Pass. Ry. Co.* v. *Phil'a R. T. Co.*, 107 Atl. 784.

INTERNAL REVENUE—STAMP TAXES.—It is held that the stamp tax on issues of capital stock applies to shares issued by an association organized as a common-law trust, the difference between such an association and a corporation organized pursuant to a statute, being deemed immaterial as affecting the liability to the requirement to affix stamps to documents.— *Malley* v. *Bowditch*, 259 Fed. 809.

STATE INCOME TAX—LEGALITY OF ASSESSMENT BY STATE OFFICERS AND METHODS OF DISTRIBUTION—LOCAL POWERS.—In a recent case the Massachusetts court examined at length various fundamental objections urged against the constitutionality of the state income tax law. The main question involved the method of distribution provided by ch. 314, Laws 1919. The aim in general of this statute was to make up to the various localities for a limited time, amounts lost to them through the withdrawal of intangible property from local taxation and eventually to distribute the yield in proportion to the state tax imposed upon the cities and towns. The court held this method not open to constitutional objection. The tax was levied by the state as a single tax district and distributed throughout the state on a basis which could not be characterized as irrational, whimsical or arbitrary. The fact that the distribution is not made to rest upon the respective contributions by the localities, does not present a difficulty. The broad considerations pertinent to equalization of the burdens of taxation are illustrated by the familiar customary and well-established methods of distribution of school expenses and those for park and sewer systems. The legislature is not confined to a single system of apportionment of the burdens of taxation. Naturally some inequalities are inevitable, the benefits of government cannot be adjusted with precise equality, the inequalities are no more than may be encountered in a rationally devised system of taxation. The requirement of uniformity as to taxes upon all property other than incomes, is not disturbed.

Some objection was raised upon the ground that the commitment of the administration of the income tax to state officers was in derogation of the constitutional powers of local officers. This objection was met by the observation that no constitutional limitation exists as to the method of administration of a state tax. Other taxes exist, administered by state officials. The power to tax is a sovereign power, an attribute of the state; cities and towns have no inherent power to levy taxes but possess only delegated powers in that respect. Power to levy an income tax has not been so delegated but is retained by the state. The tax is a state tax, the several municipalities have been abolished as taxing districts so far as concerns intangible property, which by the income tax law, is practically exempted from local taxation because made to contribute through

the income tax. The state is a single tax district for this purpose. The town system of government is recognized and preserved by the constitution, yet the powers of the legislature over municipalities as agencies is extensive. The exemption of intangible property from local taxation, leaving only tangible personalty and real estate subject to local assessment, is not such an invasion of the system of town government as to violate the constitution. A large field of taxation is still left to the municipalities, and the distribution of the income tax affords a kind of substitution for a source of revenue taken over by the state.

The tax does not violate the equal protection and due process clauses of the United States constitution in the manner suggested in *Thomas* v. *Gay,* 169 U. S. 264, 276, and *Cole* v. *La Grange,* 113 U. S. 1, as these cases recognize that the requirements of practical legislation prevent proof of positive individual advantage accruing to each taxpayer from a general contribution. It is enough if some general plan be followed which is not discriminatory, arbitrary or fanciful in its operations and which confines expenditures to public purposes.

The above paraphrasing of this interesting opinion is made because of the general application of the subject matter and to invite attention to the full opinion.—*Duffy* v. *Burrill,* 125 N. E. 135.

Residence — Domicile — Change— Burden of Proof. — In a case instituted to restrain the collection of a tax assessed under the Massachusetts income tax law, the party assessed urged that he was not liable because not domiciled in Massachusetts. The question was whether he had effectually changed his residence from that state to Rhode Island. The case is interesting and instructive because of the very full citation of authority on the question of domicile and of what is necessary to show a change therein from one state to another. In this case the evidence was held not sufficient to support the claim of Rhode Island domicile.—*Agassiz* v. *Trefry,* 260 Fed. 226.

Special Assessments—Railroad Property — Rule for Assessment. — It was held that an assessment for street improvement levied against railroad property, was without legal basis when it was shown that the improvement supplied no advantage which could be practically availed of for railroad purposes. The rule for determining the basis of assessment in railroad cases is that the benefit must arise out of a peculiar enhancement of the railroad use as a distinct and peculiar quasi-public use. *Erie R. Co.* v. *Board of Commis'rs,* 107 Atl. 406.

"Due Process of Law"—Special Assessments — Notice. — In passing upon the validity of an ordinance authorizing assessments for street improvements, which was held invalid for lack of proper procedure to give jurisdiction, the California court had occasion to restate the general principles involved in the determination of the meaning of "due process of law" in statutory proceedings involving private rights. — *Beck* v. *Ransome-Crummey Co.,* 184 Pac. 431. Similar questions are discussed in the case of *Hutchinson Co.* v. *Coughlin,* 184 Pac. 435.

License — Interstate Commerce— General Ordinance Construed Not Applicable to Interstate Commerce— Motor Busses. — A recent Massachusetts case contains a helpful review of the law applicable to a license tax ordinance, general in its nature, when applied to an individual coming within the general terms of the ordinance, but whose business is interstate. This question often presents difficulties. In this case the operator of a motor bus, running only between interstate points, and taking only through passengers, was sought to be brought within the terms of a license ordinance requiring a permit, the payment of fees and certain other regulations.

The business was held exclusively interstate commerce and the court proceeded to examine the cases as to the subjection of operators of *motor* vehicles used in interstate commerce to local regulations, referring particularly to *Adams Express Co.* v. *New York,* 232 U. S. 14, which held an ordinance inapplicable to the driver of an express wagon and to the decisions in *Hendrick* v. *Maryland,* 235 U. S. 610, and *Kane* v. *New Jersey,* 242 U. S. 160, in which license taxes were upheld for the reason stated in *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

In the instant case, the ordinance, upon examination, was held to be confined to those doing a local business and not intended to apply to those as to whom if applied, it would be unconstitutional (*Att'y Genl.* v. *Elec. Storage Battery Co.,* 74 N. E. 467) and hence was not applicable to the person involved in the case.—*Commonwealth* v. *O'Neil.* 124 N. E. 482.

License Tax — Foreign Corporation —Discrimination. — A statute of North Carolina fixed a license tax upon the selling of automobiles and provided that if the manufacturer had three-fourths of its property in the state, the tax would be reduced to one-fifth of the amount fixed. This provision was attacked by certain foreign corporations as in violation of the commerce, due process and equal protection clauses of the federal constitution. The court held that there was no violation of these clauses. The selling was made after the automobiles were in the state as a part of the general property therein. There was no discrimination against goods of another state as the statute applied equally to all (*Brewing Co.* v. *Brister,* 179 U. S. 452). Corporations are not citizens and within the provisions of the 14th amendment (*Western Turf Assoc'n* v. *Greenberg,* 204 U. S. 363). The corporations in question were not domestic corporations or doing business under conditions subjecting them to process in the state and hence were not, for that reason, within the amendment (*Blake* v. *McClung,* 172 U. S. 260). Finally, the tax was not discriminatory under the decision in *Armour* v. *Virginia,* 246 U. S. 1. Its object was held to be to reduce the license tax in cases where the seller is already paying a tax to the state on three-fourths of its assets.—*Bethlehem Motors Corporation* v. *Flynt,* 100 S. E. 693.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

Adams, Romanzo. Taxation in Nevada. A History. Carson City, 1918. 199 p.

A history of the state from its settlement, with emphasis on the taxation phase. Although no program for reform is presented, there is an indictment of the general property tax in Nevada, and suggestions as to other changes which would be beneficial.

Addis, G. S. The Finance of China. *Edinburgh Review,* no. 470. October, 1919. p. 297.

A brief account of the financial and revenue system of the Republic. The taxes imposed by the Chinese fiscal system are said to be "neither equal nor certain nor economical, nor progressively productive," and they offend against "four of the first canons of taxation originally laid down by Adam Smith".

American Exchange National Bank. Tax information. Due dates of New York City, New York state, and federal taxes. New York. 1919. 12 p.

Bogart, E. L. The Direct and Indirect Costs of the War. Carnegie Endowment for International Peace. Preliminary Economic Studies of the War, no. 24. Oxford University Press, New York. 1919. 338 p.

Each of the belligerents is discussed intensively with regard to banking and currency, loans, expenditures, and taxation, in each of the years at war. The indirect costs are considered in one chapter under the headings: Loss of human life, loss of property, loss of merchant shipping, loss of production, war relief, and cost to neutral nations. The total direct cost is put at $183,333,000,000 and the indirect at $151,612,000,000 with that statement that "it is evident from the present disturbances in Europe that the real costs of the war cannot be measured by the direct money outlays of the belligerents during the five years of its duration, but that the very breakdown of modern economic society might be the price exacted".

California Taxpayers' Association. County taxpayers' associations, an explanation of their purposes, organization, and operation. Los Angeles. 1919. 8 p.

A little pamphlet prepared with the purpose of encouraging the organization of taxpayers' associations in all the counties of California.

Chamber of Commerce of the State of New York. Report on the high cost of living. October 1919. New York. 5 p.

This brief report is devoted to the consideration of the relation of taxes to living costs. It urges a moderate federal tax policy in view of high living costs, and recommends the adoption of a tax system "which would constitute a direct incentive to frugality". The government is urged to adopt a tax program which will tend to the elimination of waste and extravagance instead of one which tends to prevent the accumulation of industrial capital.

EQUITABLE TRUST COMPANY OF NEW YORK. State income tax on individuals. New York. 1919. 40 p.

In this booklet, the full text of the law is set forth, with index and marginal references. Blank sheets are provided for memoranda on the various sections of the law.

FAIRLIE, JOHN A. Constitutional Provisions on Taxation. *Illinois Law Review,* II. December 1919. p. 321.

In this article, Professor Fairlie discusses the essentials needed by way of constitutional provisions to enable the enactment of an effective system of taxation. His observations are obviously directed at the Illinois situation where a Constitutional convention is soon to be held, which is expected to provide for tax reform in that state. His suggestions are, however, quite applicable to any state.

GIGNOUX, MRS. LOUISE FOWLER. Financing New York City. An outline prepared for the Women's City Club of New York. 1919. 44 p.

This little pamphlet shows in a very readable and intelligent manner the essential facts which every taxpayer should know as to the sources of income of the city, how taxes are levied, the steps in taxation from assessment to payment; and in part II, a description of the processes in making up the annual budget. It is so compact and yet so satisfactory that it may well form a model for use in other cities.

HAIG, ROBERT MURRAY. The revenue act of 1918. *Political Science Quarterly,* Vol. XXXIV, no. 3. September 1919. p. 369-391. New York.

An interesting discussion of the 1918 act and comparison with the 1917 act. Tables: Taxes on spirits, beverages and tobacco; excises and miscellaneous taxes; special taxes; stamp taxes; income tax rates and estate tax rates.

INVESTMENT BANKERS' ASSOCIATION OF AMERICA. Report of the Committee on Taxation. I. B. of A. *Bulletin VIII,* December 4, 1919. p. 131. Chicago.

This report presented at the eighth annual convention of the Association deals separately with the income and profits taxes. It advocates a proper distinction between capital and income now confused, as illustrated in the taxation of profit from sales of capital assets and of stock dividends; the allocation of income to the year when earned; distinction between earned and unearned incomes; equalization of individual and partnership with corporate income taxes, removing the discrimination against the stockholder; protection of the secrecy of returns; various refinements in the application of the profits tax, including the recognition of borrowed money as invested capital.

KENTUCKY TAX REFORM ASSOCIATION. *Taxation,* Vol. II, no. 2, October 1919. Louisville.

This number contains the following interesting comment on the recent revenue reforms: "Thus the effect of the first year's operation of the new laws showed that the lower tax rates resulted in more revenue and that real estate was relieved of an undue share of the burden."

KNOWLES, MORRIS. Engineering Problems of Regional Planning. National Conference of City Planning, Boston. 1919.

Community undertakings are classified and the cost apportioned as follows:

1. General taxation.
2. Regional general taxation.
3. Special assessment.
4. Rates based upon quantity of service used.

MINNEAPOLIS ASSOCIATION OF BUILDING OWNERS AND MANAGERS. *Tax Primer no. 1.*

Contains a comparison of significant items in the city's budgets for 1898 and 1918.

MOHUN, BARRY. The income tax law, the war-profits and excess-profits tax law, the estate tax law, the capital stock tax law, and general and administrative provisions relating thereto, as contained in the revenue act of 1918. Washington. 1919. 126 p.

Text of the laws in convenient form, with introduction, explanatory marginal notes, and indices.

NATIONAL ASSOCIATION OF COMPTROLLERS AND ACCOUNTING OFFICERS. Proceedings of the fourteenth annual convention. Baltimore. 1919. 120 p.

Contains interesting addresses on taxation, including: *Income tax law in Massachusetts,* by S. L. Stacey; *Collection of taxes and other revenue in Alabama,* by J. M. Jones, Jr.; *Preparing the model budget,* by A. L. Eggert; *Income tax revenue,* by Wm. Goardman; *Baltimore's system of*

taxation, by J. McC. Trippe; *Delinquent taxes and assessments,* by J. S. Myers.

OHIO TAXPAYERS' LEAGUE. The classification of property for taxation. A handbook of reference prepared under the direction of Harley L. Lutz. Columbus. 1919. 63 p.

This pamphlet, prepared in support of the campaign for the adoption of a constitutional amendment in Ohio, contains a helpful résumé of the arguments for and against classification with pertinent references to the experiences in states having classification, extracts from the opinions of experts, a discussion of the theory of the relation of classification to income taxation, and much other matter of permanent value to the student and investigator.

PLEHN, CARL C. An Assessment Roll for the Income Tax. *Journal of Political Economy,* Vol. XXVII, no. 10. December 1919. p. 875.

Emphasizes the value and importance of a formal assessment roll for the federal income tax.

PLEHN, CARL C. The Income Tax as Applied to Dividends. *American Economic Review,* Vol. IX, no. 4. December 1919. p. 771.

A brief discussion of a discrimination in the federal income tax against the recipient of dividends, which arises either because the benefit of the personal exemption does not accrue unless the recipient of dividends has other income from which this exemption can be deducted; or because the benefit of the "subnormal tax", i. e., the rate applied to the first $4,000 of taxable income, does not apply unless there is other income than dividends.

POWELL, THOMAS REED. Extra-territorial Inheritance Taxation. *Columbia Law Review,* Vol. XX, no. 1. January 1920.

With this article Professor Powell begins another series of articles on the subject mentioned, which will be closely followed by those interested in tracing the steps taken by the Supreme Court hesitating perhaps at first but at last firmly placed in establishing the fundamentals of inheritance taxation, federal and state. Those who have read Professor Powell's articles on foreign corporations excises reprinted and circulated by this Association, will be glad to follow him in this new series, which is likely to be helpful not only on inheritance taxation but as well in the study of the law of extra-state income taxation, just developed.

PURDY, LAWSON. The Assessment of Real Estate. Reprinted from the *National Municipal Review.* Philadelphia. 1919. 19 p.

Discusses the best methods of assessment and determination of value, and suggests helps which may be used, such as tax maps, field book and card index. In an appendix is given the Hoffman-Neill Rule, the Lindsay-Bernard Rule and the Somers Rule for the determination of values of lots.

RITCHIE, ALBERT C. Power of Congress to Tax State Securities under the Sixteenth Amendment. *American Bar Association Journal,* Vol. V, no. 4. October 1919. p. 602-613. Baltimore.

Congress' power, as provided in the sixteenth amendment, to tax incomes "from whatever source derived" does not constitute power to tax income from state securities, and thus to interfere with a sovereign power of the states. This phase merely removes the necessity for apportioning income taxes when they are direct and for discovering the source of the income to determine whether they are direct, a procedure made necessary by the decision in the Pollock case that the federal income tax law of 1894, upon the income from land, was unconstitutional because a direct tax and not apportioned among the states in proportion to their respective numbers as shown by census or enumeration. (Art. I, sec. 9 of the Constitution.) Any interference with the borrowing power of the states, therefore, was unintended, and Congress has no more power to tax state securities now than before the adoption of the sixteenth amendment.

RUSH, STEPHEN G. Relation between Invested Capital and Excess Profits Tax *Journal of Accountancy,* Vol. XXVIII, no. 4. October 1919. p. 273.

SELIGMAN, EDWIN R. A. The New York Income Tax. *Political Science Quarterly,* Vol. XXXIV. December 1919. p. 521.

In this article Professor Seligman gives a comprehensive and very instructive and interesting account of the course of tax development in New York, culminating in the adoption of the income tax, pointing to the inevitable elimination of personal property taxation. Then follows a detailed analysis of the turns of the New York income tax law with helpful reference to the points of divergence from the federal law, the special characteristics of the law and the provision which has provoked discussion, the taxation of the non-resident.

The article closes with a forecast of the remaining steps deemed by the author necessary to round out the program and to perfect the system of taxation thus inaugurated, i. e., the complete elimination of tangible personal property; the differentiation between earned and unearned incomes, the perfection of the administration and the simplification of the cumbersome and troublesome method of taxation of public utilities by bringing them within the general plan through a tax by reference to net income.

Summing up the discussion, the author says: "But to the discerning student it is clear that what has been accomplished in New York is a real fiscal revolution, the beneficent results of which will gradually be realized by the community at large. In this sense the New York income tax law of 1919 constitutes an important milestone in the economic and political development of the United States."

SELIGMAN, EDWIN R. A. The Cost of the War and How It Was Met. *American Economic Review,* Vol. IX, no. 4. December 1919. p. 739.

A survey of the direct money outlays of the leading belligerents, the steps taken to meet these outlays, the character of the war taxes, and of the borrowing policy of these countries.

STAMP, J. C. Taxation of Capital and Ability to Pay. *Edinburgh Review,* no. 470. October 1919. p. 371.

The following conclusions are stated:

1. For annual taxation, capital is a necessary partner with income, to test true ability, but a strictly subordinate and junior partner which is incapable of carrying on business for himself.
2. For periodical taxation, capital taxation is only indirectly and partially related to individual ability at all.
3. For special taxation to reduce war debt, capital is inferior to income as a test of "ability to pay".

WOODWORTH, L. D. National "State Aid" and its Cost to Taxpayers. *American Property Owner and Realty,* IV. August 1919. p. 10.

"In its present form a more costly and irresponsible and ineffective plan than 'state aid' through federal grants and bureaucratic control could hardly be devised."

ZANGERLE, JOHN A., County Auditor of Cuyahoga County. Brief in re Arbitration of Valuation of Tracy-Macy Premises. A discussion of the proper valuation for rent-fixing purposes of improved premises subject to periodic reappraisals. Cleveland, June 1919.

Mr. Zangerle's résumé is in part as follows:

"Our examination must make it increasingly evident that if premises are adequately improved, properly rented, skillfully managed, the value of such improved premises is fixed by its earning power, that the value of the premises exclusive of improvements must be fixed by a capitalization of the residue after allowing the investor interest on his investment, depreciation, expenses, including taxes and cost of management. This process . . . leaves the lessee no profit, it provides for him bare costs and no remuneration commensurate . . . to his risk. These bare costs must be allowed to the investor. . . . Investors will not improve property if bare costs are not available, especially where the lease is a reappraisal lease excluding all possibility of offsetting losses through increment of land value.

ZANGERLE, JOHN A. Untaxed Wealth of Cleveland and Why. 66 p.

This pamphlet portrays the trials and tribulations of a taxing official operating under a rigid general property tax system such as obtains in Ohio. It is written from the practical viewpoint of a highly efficient official with a distinct appreciation of the fundamental principles of taxation and their relation to the social life of the community. The reader is taken through the mazes of difficulty which beset the assessor upon every hand and by reference to actual results, is shown the absurdities arising in attempting to deal equally or "uniformly" with species of property having entirely dissimilar characteristics.

While not purporting to advocate any particular scheme of taxation, a résumé of such changes as are advisable is given with particular emphasis upon the fundamental need of power to classify and of home rule for cities which the writer notes to be necessary in order to create local sentiment for an understanding of and sympathy with the varying fiscal needs of a modern community.

ZOLLER, J. F. Personal Property of Corporations Subject to State Income Tax Law not Taxable for School Purposes. Schenectady, N. Y. 1919. 19 p.

An opinion upon and discussion of certain provisions relating to exemptions in the recently enacted corporation tax laws.

ARIZONA. Report of the Proceedings of the Arizona Tax Conference, held at Grand Canyon, Arizona, July 21-26, 1919. Phoenix. 237 p.

This report follows the familiar method which the Arizona tax commission has developed for scrutinizing the work of the local assessors. The address of C. M. Zander before this conference was published in the October number of the BULLETIN.

CONNECTICUT. Information relative to the Assessment and Collection of Taxes. 1919. 48 p.

FLORIDA. *Taxpayers' Journal.* Vol. I, no. 1. September 1919. Tampa.

This publication recently started by the Taxpayers' Association of Florida, seeks "to serve as a medium for encouraging revision of the existing tax system of the state." It is edited by J. E. Downing and Perry G. Wall, and promises to arouse constructive thought on tax questions in that state.

GEORGIA. Report of special tax commission. Atlanta. 1919. 88 p.

The majority report recommends classification, segregation, and income taxation, basing the arguments upon the experiences of other states and the opinions of economists of note. One member submits a minority report, rejecting classification and segregation as not suited to Georgia.

KANSAS. Revised Instructions to be Observed in the Assessment and Equalization of Property, both Real and Personal, for Purposes of Taxation. Topeka. 1919. 118 p.

The latest revision of the excellent manual of instructions to assessors and other taxing officials which is provided by Kansas Tax Commission.

MASSACHUSETTS. Instructions to Assessors, No. 3. Issued by the Tax Commissioner. Boston. 1919. 22 p.

A brief but comprehensive statement of the provisions of law applicable to the duties of local assessors. Contains helpful hints as to the interpretation of the statutes with reference to the pertinent decisions of the courts. Of particular usefulness are the chapters devoted to the valuation of real estate and the elements of value in land which treats of the various classes and contains suggestions for the determination of values, including the effect of water-power rights and of location and surroundings.

MISSOURI. Law and Regulations relative to the Tax on Income of Individuals, Corporations, etc., as Amended May 6, 1919. Compiled by George E. Hackman, State Auditor. Jefferson City. 1919. 53 p.

MONTANA. Report to the State Efficiency and Trade Commission, rendered November 1, 1919 to Governor S. V. Stewart. Helena. 1919. 166 p.

This report covers an investigation of the departments, bureaus and boards of the state government with a view to making recommendations for their consolidation and for more efficient administration, and of the cost and selling prices of articles of merchandise, commodities and products necessary to sustain life. It describes the personnel of all state boards and commissions; the exact condition of state educational and charitable institutions; and discusses at length the budget system.

NORTH DAKOTA. The New Day in North Dakota. Published by the State Industrial Commission. Bismarck. 1919. 156 p.

This publication contains some of the new legislation enacted in North Dakota. Of especial interest to readers of the BULLETIN will be Section C, containing the new tax legislation. This legislation relates to the income tax, the inheritance tax, the classification of assessments, and the motor registration tax.

OHIO. A State Budget System for Ohio. Submitted to the Committees on Administrative Reorganization and Taxation of the Ohio General Assembly by the Ohio Institute for Public Efficiency. Columbus. 1919. 21 p.

OHIO. Report of the Joint Special Taxation Committee of the 83rd General Assembly. Columbus. 1919. 165 p.

WASHINGTON. Minutes and official proceedings of the State Board of Equalization. Olympia. 1919. 81 p. tables.

WISCONSIN. Income tax law with explanatory notes. Fourth edition. Tax Commission. Madison. 1919. 82 p.

In three parts: Part I describes the law, the definitions, deductions allowed, exemptions, and rates. Part II describes the administration of the law, covering the appointment of assessors and rulings as to returns; appeal and review; apportionment and collection; offset of income tax by personal property tax; taxable receipts; expenditures not allowed as deductions; depreciation percentages, and the provisions of the soldiers' bonus act. Part III deals with the duties of assessors of incomes in connection with general property taxation.

It is suggested in the preface to this pamphlet that "familiarity with the law and conscientious observance of it on the part of taxpayers will simplify the preparation of income tax returns, limit the scope of inquiry on the part of tax officials, and in every way promote efficient and satisfactory administration".

UNITED STATES BUREAU OF THE CENSUS. Financial statistics of cities, 1918. Washington, 1919. 357 p.

THE NATIONAL TAX ASSOCIATION

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Zenas W. Bliss, Chairman Board of Tax Commissioners of Rhode Island, *Vice-President*
Alfred E. Holcomb, Assistant Secretary American Telephone and Telegraph Company, *Secretary and Treasurer*

OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

VOLUMES OF PROCEEDINGS. The volumes of proceedings, covering conferences held annually beginning in the year 1907, contain a large amount of practical up-to-date comprehensive information on all phases of taxation. The volumes are cloth-bound, fully indexed, and contain approximately 500 pages each.

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REPRINTS FROM VOLUME 12

We are now able to announce that reprints from several of the papers contained in volume 12 may be obtained from the secretary. There is no large supply of any except the Model Tax System Report, The Report of the Federal Taxation Committee and Mr. Rosenthal's paper on the Work and Influence of the Association. There is, however, a limited supply of reprints of the following: — Taxation of Banks, Harrison; Indiana Problems, Phillips; Intangibles, Fairchild and Wendel; Constitutional Aspects, Judson; Railroads, Gray; Foreign Corporations, T. R. Powell; Federal Taxation, Adams; New York Income Tax, Tanzer and Powell; Mine Tax Report; Exemptions, Robins; Non-Partisan League, Steele.

REMEMBER MARCH, THE IDES OF MARCH REMEMBER

Along about this time of year, March 15, to be exact, a considerable proportion of the inhabitants are involved in the mysterious process of making income tax reports. Along with others, the editor became involved to such an extent that it looked for a time as if this issue of the BULLETIN would have to be postponed. Due to the kindness of members who must have had compassion upon him, that catastrophe was avoided, but he is left with such a sense of his utter helplessness before the intricacies of the income tax laws, federal and state, and of almost absolute disgust at this situation that he is led to join in the general protest against a system of taxation that can have such disastrous personal effects upon his mental and physical state.

It is generally admitted that some simplification must be made and it is to be hoped that a start may soon be made towards its accomplishment. It would appear even that such a movement is essential if income taxation is to accomplish the purposes to which it has been said to be adapted and for which it has been supported. There is not only little apparent activity in Washington looking towards simplification but there is even reason to anticipate further complications as a result of the recent important decision of the supreme court in the stock dividend case.

Turning to state income taxation, we find reason to fear additional complications, due here to the difficult questions of jurisdiction. The non-resident, in gaining

recognition of his rights under the federal constitution, through the decisions in the New York and Oklahoma cases, rendered March 8th, has opened avenues of difficulty which have not been explored. If we are to have, through the attempt to tax the non-resident, only a repetition of the difficulties which long irritated us in property taxation, with perhaps added complications, due to the personal equation inherently present in income taxation, we are certainly far from the goal of equality and justice in taxation as between states that we have hoped to reach.

These observations, made as above indicated as the result of a disturbed state of mind, may form a preface to the reference to one plan which would seem to have possibilities. With a view to calmly surveying the situation and of considering ways and means of avoiding interstate difficulties and of preserving the advantages already gained, the New York State Tax Association has deliberately set apart one day at its conference to be shortly held, for mutual discussion by representatives of that state and of the adjoining states of New Jersey, Connecticut and Massachusetts, of the requirements of income taxation. The New York law (now somewhat "disarranged") is to be used as a basis of discussion. Through such a movement there is opportunity for much constructive criticism and for the discussion of plans to prevent at least further extension of those difficulties which so easily arise through failure to observe and to definitely recognize the demands of interstate comity under our systems of government and jurisprudence.

RESIGNATION OF WILLIAM H. CORBIN

As we go to press, we are advised of the resignation of William H. Corbin as Tax Commissioner of Connecticut. This news will come as a severe shock and as a keen disappointment to his hosts of friends in the Association who have come to look upon him as a strong reliance in the support of all that is best in taxation. It is putting it mildly to say that the officers of the Association, including the Editor, will regret this action, and it is to be hoped that this retirement from active participation in administrative duties will surely not mean relaxation of interest in our work in general but that he will continue to be in the future as he has been in the past, a refuge for counsel and advice in the serious and disturbed times which lie ahead.

To recount the accomplishments in Connecticut during his official life as Tax Commissioner, would invite a reference to almost every important advance in the art that has been secured in recent years, for each of them has first and last been brought to some degree of practical application there. We think casually of Corbin's work on inheritance taxation; supervision and improvement in local assessments; apportionment of state taxes on the basis of local expenditures, thus eliminating friction through competition for low assessments; revolutionizing local administration and compiling intelligent and helpful statistics, as a basis for applying corrective methods; standardization of forms and blanks used throughout the state; revising and modernizing the various state taxes, formerly in a chaotic condition, involving the substitution of simple and effective methods of taxation of railroads and other utilities, and finally the introduction of the net income tax in place of the previously erratic property tax for business corporations, by the simple expedient of using the report of the federal government. These are but a few of the accomplishments in Connecticut secured, it may safely be said, solely through the intelligent, vigorous and indefatigable industry and persistence of this exceptional official. He has frequently been called upon to serve on investigating commissions and the reports of these commissions as well as his own official reports, contain in themselves abundant sources of information to all concerned with questions of taxation.

In the councils of the Association, Mr. Corbin has been a constant and consistent friend and helper. We shall refuse to allow ourselves to consider him in any sense separated from active association with us, and we cherish the thought that he will not think it undignified if we here refer to him in the terms which the graduates of Yale so commonly use, reflecting their memories of his triumphs on the football field—"Pa" Corbin, one of the fathers of this Association. Our best wishes will follow him as he leaves the administrative field.

INCOME AND EXCESS PROFITS TAXES AS BUSINESS EXPENSES

BY A. E. HOLCOMB

A question which has begun to be agitated and which is likely to cause some confusion and litigation, until settled decisively, is as to the character of income and profits taxes when levied upon business organizations. Naturally the question arises most acutely in the case of regulated utilities in controversies as to the propriety of including these taxes as a part of the cost of rendering services. Little authority has thus far appeared although suggestions have been made by regulatory commissions that the taxes in question partake of the nature of taxes upon the owners of the business personally and in some way cannot be deemed a part of the cost of production or service and hence are not deductible. Until some authoritative court passes upon this question, it seems likely that there will be conflicts of view upon this point. As an illustration of what may be expected we may cite the observations of a Justice of a lower court in a recent case in New York where the question at issue was as to the reasonableness of a rate for furnishing gas, which involved the fair value of the plant and the expenses of production and distribution. He says:

"The defendants contend that the federal income tax is an excess profits tax which may not properly be included as an expense of the company. It is the court's opinion that no excess profits taxes may properly be included as an expense. A profit tax in its very terminology implies a tax on profits as such. It is the amount reached after payment of all expenses and therefore cannot be treated as an expense. In the returns to the government, upon which the profits tax is based, assuredly the amount of tax is not included in the expenses of the business. The theory of this tax is that he who has secured the profits surrenders or returns a portion thereof to the government. Stated another way, the plaintiff must contribute to the government in common with others from its profits, as such, its share towards defraying the expenses of the war. It should, therefore, not be permitted to reimburse itself from its customers because of such contribution."

It is likely that similar claims will be made in tax proceedings involving the process of a capitalization of net earnings to produce a valuation. The discussion of the Wisconsin supreme court in the Stern Milling Co. case (175 N. W. 931), digested in this issue of the BULLETIN has some bearing upon the question, although in that case the court was construing net income as arbitrarily defined by the income tax statute of that state. It is to be noted, however, that this court fully recognizes taxes as an expense which must be taken account of in determining prices, and hence indicates its view as opposed to that above quoted.

The matter is of definite importance in connection with the general subject of business taxation to which much study is now being given and it would seem highly appropriate that the economic and practical problems should be outlined in authoritative fashion at once, in order to avoid the chaos and confusion which may be injected into federal and state taxing systems through the suggestion of a "disguised" personal income tax lurking in business taxation.

The complication in state income taxation thus caused, is particularly possible when the business tax is applied to a foreign organization whose stockholders or proprietors are beyond the jurisdiction of the taxing state and are thus subjected to taxes not imposed by that state.

In the case of the regulated business the present uncertainties in the problems of "fair return" and "cost of service" will be further complicated and multiplied by the possible suggestion that the rate of return is to be affected by the varying incomes and the consequent income taxes of the individual investors in the business and by their residences.

The question is one worthy of analysis and discussion at the hands of the members of the National Tax Association. The writer made some suggestions bearing upon this matter in the BULLETIN of December 1917, p. 59, and again in that of February 1919, p. 124. The extract above quoted is from the decision in *Jamaica Gas Co.* v. *Nixon,* printed in the *New York Law Journal* of February 14, 1920.

CAN A PUBLIC UTILITY SHIFT ITS TAXES TO ITS PATRONS?

CARL C. PLEHN

Who bears the burden of a tax on a public utility? Is it the stockholders of the company or is it the persons served by the company, or is the burden divided between them?

The answer to this question was involved in a recent case in the courts of New York (*Jamaica Gas Light Co.* v. *Nixon*, etc., N. Y. L. J., Feb. 14, 1920). In this case the court assumed that the federal income tax levied on the net income of, and paid by, the company was a tax on the net profits, and hence could not be considered an expense of the company in fixing the rates which the company might be permitted to charge for its services.

While the particular decision is somewhat confused by calling the income tax an "excess profits tax" (as though any public utility can in these days earn an *excess* profit!) yet the thought is sufficiently clear. It is that the income tax is intended to be a tax in proportion to everyone's net income and is a personal tax. If, therefore, the rates which the regulating commission allows the utility to charge its customers give the stockholders a fair return on their investment, the income tax levied on that fair return is a matter subsequent to, and outside of the considerations properly entering into the computation of the rates. "It (the company) should not be permitted to reimburse itself from its customers because of such contribution." All of which seems to be good legal doctrine.

Much more interesting, however, is the underlying assumption that the company, if permitted to try to do so, could reimburse itself from its customers because of any tax. This is an assumption distinctly untrue.

Of course, any rate-making body which acts too literally on the legal theory embodied in the decision above referred to, may find that capital is not forthcoming for the replacements or betterments needed by the utility and that the public will suffer more, possibly, from poor service than it would suffer from higher rates. This will undoubtedly be the case if the stockholder should happen to find that the so-called "fair return" on his investment after being reduced by the income tax is less than he can get by investing his money somewhere else. So it may very well be that the rate-making body will find that it has won an empty victory in this decision. This legal theory is a sound guide in practice only if the income tax imposes a uniform burden on all. If it does not, then the theory applies only to a non-existent hypothetical case.

The assumption above referred to raises an interesting economic question of fact, namely, what is the incidence of a tax on a monopoly? Economic writers have, quite generally, inclined to the view that a tax on a monopoly cannot ordinarily be shifted, or if shifted at all can be shifted only in part. This general principle they are given to modifying in the case of some taxes, as for example a customs duty, which in their nature are only advanced by the monopoly. Business men, however, seem, with great unanimity, to assume the exact opposite. I have met but few business men who do not believe that the monopolist will add *all* his taxes to the price or rate he charges and thus joyfully pass the burden on, unless he be prevented from doing so by the law or by regulation. These business men do not stop to explain what kind of poor fools the managers of a monopoly must be who, having this assumed power to raise rates at will, do not raise them, tax or no tax. But we may let that point go.

It has occurred to me that part of the difficulty which shrouds this question comes from centering attention on the shifting and incidence of the tax alone, and that we may get a more useful view if we try to look at all the more immediate effects of the tax, and not merely to search for the person who bears the burden of the tax *per se*. You get a poor idea of a forest by looking steadfastly at one tree

only. The point may be illustrated in quite a different field of taxation. A customs duty, we readily admit, is shifted to the consumer of the imported goods. But that is only a part of its effects. If high enough it cuts down consumption, depriving would-be consumers of the wares, it lessens the importers' trade and hence cuts down his profits, it also deprives the manufacturer of the goods of a chance for profits and his workmen of a chance for wages. Merely to say that the tax is shifted tells but a small part of the story.

The following seem the most essential questions for our present purpose: If a tax is imposed on a monopoly, will the rates go up and how much. If they do go up who loses most, the monopolist or his customers? Of course if the rates do not go up it may be assumed that the monopolist bears the whole tax. Answers to these questions will by no means exhaust the effects. But they place us where we can see some of them clearly.

Possibly the simplest illustration we can choose is a tax in proportion to the gross receipts. Other forms of taxes will vary in their effect but to discuss them all would take much space. Again, a street-car company will furnish an excellent base to work on, for its receipts are practically of one sort only. Let us, then, seek an answer to the straightforward question: What will be the effects of a tax of 10% on the gross receipts of a street-car company?

A tax on the gross receipts of a street railway monopoly will raise fares a little, but not nearly enough to reimburse the company for the tax and will very materially reduce its profits. ("Raise" and "reduce" are both used with reference to an assumed time when there was no tax.) Moreover, the loss of profits resulting from the tax comes in such a way that no regulating board, no matter how well inclined, can by raising the rates or fares restore the company's lost profits, even though the rates or fares were very low before the tax was imposed. At best it can help restore only a part of the tax, and never put profits back to the same sum as before.

The above conclusion was reached with the assistance of a mathematical friend (Prof. F. R. Macaulay of the University of California) and the formula, which will not be presented here, stands at the disposal of the mathematically inclined. The theorem can, however, be explained, if not so conclusively proven, without resort to a mathematical formula. To explain the theorem we have to examine: (1) amount of travel, and hence the company's receipts, at the several different rates of fare, and (2) the expenses as they vary with the different amounts of travel.

The number of passengers at different rates of fare

Raising fares means loss of passengers. At one dollar a ride there would be very few to ride; at ten cents a ride, less than at five cents.

Lowering fares will increase the travel. Of course not forever. For if everybody who had the slightest excuse or inclination to ride did so at ten cents a ride, no more would ride at one cent. Impractically high and impractically low rates need not be considered. The practical question falls within a range of possibly five cents—say from five cents a ride to ten cents.

There will be less fares taken in at six cents a ride than at five cents, still less at seven or eight or ten cents. What happens when fares go up even a little is that some people walk short distances which before they rode, and others plan to do more errands on each trip, making less trips. Just what the figures would be we do not know because street railways cannot make experiments with the different rates and, what is more important, surrounding conditions do not remain the same. But we do not need to know them, for the theorem above stated does not depend on any particular relationship of the number of passengers to the fares, *provided only that there is a continuous drop in the number of passengers as fares rise.* If more people will ride at six cents than at five cents my whole argument is destroyed. But I believe no one will refuse to grant me the essential premise that fewer people will ride the higher the fare.

The nature of street railway expenses

Of the expenses of a street railway a very large part run on whether there are many passengers or only a few. A relatively smaller part of the expenses vary directly with the number of passengers carried. The same roadbed and rails which carry a hundred cars a day will have to be there if there are only fifty cars to pass

over them each day. A car that would carry twenty-five passengers (or any other number) will have to be run even though it is never quite filled. On the other hand, two full carloads of passengers require twice as many platform-men and twice as much oil and power as one carload. The distinction is simple. There are: (1) fixed or overhead expenses which are less per passenger the more passengers there are, and (2) traffic running expenses which are substantially the same amount per passenger, be the number great or small.

The following table illustrates very roughly the effect of these combined elements on the net profits of a company. The figures themselves are round numbers and simplified so that the calculations will not require pencil and paper. I have purposely exaggerated the probable decline in passengers carried in order to avoid difficult small fractions. But whether the drop in passengers carried per day be from 150,000 at five cents to 100,000 at seven cents, as assumed, or only from 150,000 to 140,000 or 149,000 the general principle is the same, provided the drop is continuous for all rates. Of course, also the effect is not so large if the tax is lower. Ten per cent is used only because it is so simple to calculate and being large avoids the difficulty attendant upon examining small fractional differences. Nor does the argument depend upon assumed ratios of the fixed or overhead expenses to the variable expenses. The only assumption necessary to the argument is that the expenses per passenger are lower the larger the total number carried, which is always true in the street railway business.

Rate of fare cents.	Average number of passengers carried per day.	Gross receipts	Fixed expenses.	Variable expenses, 2c. per passenger.	Total expenses.	Net profits before tax.	Tax 10% of gross.	Net profits after tax.
5 . . .	150,000	$7500	$3500	$3000	$6500	$1000	$750	$250
6 . . .	122,500	7350	3500	2450	5950	1400	735	665
7 . . .	100,000	7000	3500	2000	5500	*1500*	700	*800*
8 . . .	82,000	6560	3500	1640	5140	1420	656	764
9 . . .	67,500	6075	3500	1350	4850	1225	607	618
10 . . .	55,000	5500	3500	1100	4600	900	550	350

It is obvious that if there were no tax, and the company could fix the rate of fare where it pleased, it would probably fix the rate at seven cents, for at that rate it makes a profit of $1500 per day, which is larger than it would get at any other rate. Closer inspection of the table shows that if it were possible to collect fares in fractions of a cent, the company might prefer to fix the rate at about 7.05 cents, for it will be observed that the profits fall away a little faster below seven cents than they do above seven cents, indicating that there is a maximum profit at a rate somewhere between seven cents and eight cents greater than at exactly seven cents. But as the difference between $1400 at six cents and $1420 at eight cents is small it would be but a trifle over seven cents.

At first glance the reader might infer that the company would also make the largest possible profit after paying the tax, if it charged seven cents as before rather than any other rate. For if it went up to eight cents it would make only $764 as against $800 at seven cents. But again one must carefully observe the figures above and below the seven-cent line. The drop from $800 at seven cents to $665 at six cents is a drop of $135 while the drop from $800 at seven cents to $764 at eight cents is only $36. This is a greater proportional difference than before the tax and is too great a difference to be neglected. It indicates that there is a maximum profit greater than $800 to be had somewhere between seven cents and eight cents. A separate calculation which it scarcely seems necessary to introduce here shows that at seven and one-quarter cents the net profits after paying the tax would be about $812 and that is the maximum profit it could obtain at any rate of fare. The interesting and vitally important thing is that this

after-the-tax maximum profit always corresponds to a *higher rate of fare* than does the *before-the-tax maximum*. It is never much higher but always higher. With the particular figures used in our illustration it was 7.25 cents as against 7.05 cents, approximately.

It was stated above that no public utility commission can restore to the company its lost profits or reimburse the whole tax. Humpty-dumpty profits made his fall when the tax was imposed and can't be put together again as long as the tax continues. If before the tax went on, the legal rate in the illustration were five cents (which, everything considered, was far too low) and the profits were, as in the table, $1000, and if after the tax the company were permitted to raise the rate to seven cents, it would still be $200 shy on former profits.

To sum up, then, the effects of the tax are: (1) a slight raise in rates (if permitted), (2) if rates are raised a goodly number of people walk or stay at home, or ride in automobiles who would otherwise ride on the cars, (3) the profits of the company are inevitably lessened, whether rates are raised or not, (4) new capital is consequently harder to get, and (5) if rates are raised less platform men and other workers find employment.

Economists have been wrong in so far as they have assumed that the tax on a monopoly cannot be shifted at all; right, however, when they contended that it could be shifted in small part only. Business men are all wrong in assuming that profits can be kept intact by simply passing the tax on to the consumer.

We may leave the reader to draw his own conclusions as to the practical application of the knowledge thus won, and as to what will be the best public policy to pursue. These are matters beyond the sphere of taxation.

VALUE OF PUBLIC UTILITIES FOR TAXATION AND RATE MAKING

HARLEIGH H. HARTMAN[1]

Theodore Roosevelt, while governor of New York, said: "It is true that a corporation which derives its powers from the state should pay to the state a just percentage of its earnings as a return for the privilege it enjoys." This statement was made at a time when rate control was unknown, and any sum recovered from a corporation represented a saving to the public. The application of such a theory to the public utility field cannot be justified with present regulatory methods. Rates are now limited to provide only a reasonable return. Taxes are included in the operating expenses and deducted from gross income before the return is computed. They are paid by the consumer, and do not come out of profits. The manipulation of the tax rate has no effect whatever upon the rate of return. Any excess tax upon a public utility is automatically transferred by operation of law from the stock and bond holders to the consumers. It forms an unjust tax burden upon the users of a public service. It is diabolically out of harmony with modern theories of regulation because it forces utility rates needlessly high, and, on account of the form of the utility rate schedules, because the tax is wholly without relation either to the benefits derived or ability to pay.

Justice in public service taxation can be secured only by taxing the company in the same manner as the individual, the income tax being omitted in the case of corporations.[2] It is the writer's purpose not to consider the merits of the general property tax, but to point out that as long as that tax is applied to individuals, equity requires its use in the case of utility companies and that its application in that field presupposes some form of valuation.

[1] Author of "The Meaning and Application of 'Fair Valuation' as used by Utility Commissions," First Prize Essay in Hart, Schaffner & Marx Competition, 1918 series.

[2] The reasons for omission of the income tax have been pointed out in these columns by Mr. Alfred E. Holcomb in an article entitled "Some Observations on the Proposal to Tax Public Service Companies by a Progressive Rate on Gross Receipts." (See BULLETIN, February 1919.)

Valuation work, if more than a mere guess or conjecture, is highly technical, is expensive, and requires considerable time. Its use for tax purposes involves questions of practicability as well as theory. Public service commissions throughout the country and the valuation department of the Interstate Commerce Commission have expended vast sums of money in valuing utility property. They have employed the best engineering and accounting skill available. This work, properly utilized, should materially lessen the labor of the tax-assessing body. It is in most instances matter of public record, and would undoubtedly be available on official request in all cases.

There are three distinct steps in valuation—the making of the inventory, the determination of the elements of value properly considered in view of the specific purpose of the appraisal, and the final determination of value. The first step is the sphere of the engineer and accountant. The second step demands the knowledge of the economist, and the third is the province of the special officer or commission entrusted therewith.

The inventory lists, in detail, the tangible and intangible property of the utility. The appraisal assigns a unit value to each item listed. The average life, age, and condition of each item is stated to show the depreciated value. An accompanying history of the property gives an accurate account of the organization, financing and development.

The appraisal is the engineer's or accountant's statement of the exact present condition, character and amount of the tangible and intangible property. It is not concerned with the elements of rate value or tax value, but includes all elements of value. It is therefore equally advantageous for tax or rate making purposes.

The economic features of taxation have been carefully threshed out and definite valuation rules formulated which need not be considered here. Naturally they differ from the valuation rules fixed for rate making.

Ordinarily three appraisals are submitted —original cost, reproduction cost and normal cost. The final valuation determines which of the elements of value inventoried by the appraiser and branded admissible by economic rules shall be taken into consideration in the particular case. It is a judicial blending of the three appraisals to meet the existing set of facts. It involves careful consideration and allowance of overheads. If such a judgment has been made in a rate case and can be adapted to tax purposes, such adaptation would seem more expedient than beginning the tax valuation where the appraiser stopped.

The differences between rate and tax valuation, though fundamental, are not such as necessarily preclude all joint use. Rate making is cost finding. The value of the property sought for a rate base is the actual reasonable investment in property used and useful in rendering the public service for which the rate is sought. The normal market value of the property is only indirectly involved. Cost of service, not value of property, is the primary element to be ascertained. A valuable tract of land suitable for an office or power site may be used for storage when a much cheaper lot would serve the purpose equally well. A structure may have been built with capacity far in excess of the needs of the present or immediate future. Machinery superseded by more modern equipment may be held for emergency use. In such cases, market value cannot govern in rate making. Property value is included in the rate base only when the property is used and useful in rendering the public service. It is included only to the extent that the investment was a reasonable one, taking into consideration all phases of the service to be rendered. Appreciation is ordinarily excluded. Earning power is not in question at all for the basis of earning power is the figure sought. Rate making determines earning power.

Valuation for tax purposes seeks to determine value not cost. It is concerned only indirectly with actual investment and not at all with the reasonableness of capital expenditures or the usefulness of the property in rendering the particular public service. It is vitally interested in earning power.

The physical property of a public utility is highly specialized. The track or distribution system have no use other than in the public service. Except in connection with a going concern, the greater part of the property has only salvage or junk value. The earning power sought for tax purposes, therefore, is that fixed by the

rate making valuation. The two figures, tax value and rate value, are variables approaching the same limit. They may be, but are not necessarily the same. Thus where a tract of land held for future use is excluded from the rate base on the ground that it represents an unreasonable investment, or real estate no longer required for utility purposes but held pending an advantageous sale has been rejected by the utility commission, the tax assessor will include the land in his valuation at its normal market worth. Similarly where equipment no longer used or useful because of change of service is excluded from the rate valuation it will be included in that for tax purposes. Such elements have a real value, a real earning power which the assessor must recognize though the rate maker cannot.

Differences of this sort, however, are being eliminated fast. Efficient management and competent regulation are constantly bringing the two values closer together. Injudicious expenditures are being eliminated. The occasions when the utility does not earn the return allowed are becoming few.

Public service franchises are included in the rate base only to the extent of the actual expenditure for such privileges. The rights conveyed by these grants, however, have no value other than that arising from their use in the public service, and their earning power in that field is fixed by the figure at which they are incorporated in the rate base—their cost. That figure is also the tax value of the franchise.

Good-will is excluded from the rate base on the theory that a monopoly can have no real good-will as customers must trade with it. Development costs are included in going value. With a rate of return definitely fixed, no element is here excluded from the rate base that should be incorporated in the tax value.

Rate bodies value utility property at its depreciated worth, including in the rate base any reserve held against depreciation. They seek present value, which is the true basis also of tax value. They do not offset against depreciation the appreciation which a reproduction-cost appraisal would include. They use normal unit values figured over a five-year period, excluding abnormally high or low prices. They seek that normal value that should be the basis of the tax assessment.

Intangible values, engineering expenses, architects' fees, organization expenses, etc., are included in the rate base, but they form a legitimate cost contributing to the normal market value of any going concern and are as properly included in the tax as in the rate value. Working capital is value used in the business, producing earnings, and should be included in the valuation both for tax and rate purposes.

The principal variance between rate and tax value, not heretofore mentioned, occurs in connection with appreciation in land values and property acquired by the company without cost. If the rate base is determined upon the investment theory, these elements of value must be excluded. The moment "unearned" increment grows to any considerable magnitude, if regulation is justified at all, the property becomes too valuable for utility purposes and the excess value will not be used or useful property within the meaning of the law. Neither appreciation or property acquired without cost represents any real sacrifice or investment by the stockholders which can be permitted to increase rates, otherwise than to provide a reserve against the depreciation of the gift property. Such elements of value resemble vacant real estate which has a potential but latent earning power. They are legitimate subjects of taxation.

Rate value, because of these discrepancies, cannot be accepted as tax value, but comparatively few alterations seem necessary to adapt it for use as a basis for tax valuation, and the appraisals upon which the rate value is predicated furnish all the material necessary for the alterations. Amended to include property held for non-utility purposes at its appraised value, by increasing property held for emergency use or future needs to its normal market value, to include the appreciated land values shown in the reproduction cost appraisal and the appraised value of donated property, the rate valuation might be profitably made use of by the tax assessor.

SUGGESTIONS ON THE PENDING FEDERAL BUDGETARY BILLS

OGDEN L. MILLS[1]

The National Tax Association, organized in 1906, has since that time been consistently, studiously and quietly engaged in building up an organization of persons who by experience and training and through a disinterested desire to promote the public welfare, are willing to devote time and thought to the fundamental prerequisites of a proper apportionment of the burden of taxation. Starting with a very few members, it has gathered strength and support, until now it numbers among its members the State taxing officials of every State in the Union, the possessions of the United States, the Canadian provinces, and of several foreign countries. Its membership also embraces numerous public taxing officials, the leading economists specializing in public finance at the universities, and a large number of public-spirited individuals, including lawyers, business men, state executives, members of Congress, and of the various state legislatures and organizations or associations interested in the development of a sound, effective and responsible administration of the tax laws. I understand that we are honored by having among our members the chairman of this committee, and at least one member of the corresponding committee of the House.

From the start, the Association has urged and realized that the matter of apportioning the burden of taxation, with its ever-increasing demands, must be accompanied by a corresponding careful and effective control of the disposition of taxes. Believing that to do away with public distrust, dissatisfaction and complaint, it is essential that the people should know not only that their taxes are sound, just and fairly apportioned, but also that there is an intelligent distribution of revenue carried out in a businesslike and thrifty way.

It is generally conceded, and therefore unnecessary to dwell on, that our present system of estimating the financial needs of the Government, of making appropriations therefor, and of reports of expenditures, is unscientific, lacking in uniformity of classification, and incapable of giving to Congress, the President or the people, a picture of the financial status of government, either in respect of the past fiscal year or of the needs of government for the coming year. It is also generally admitted that the remedy for this state of affairs is to be found in the establishment of what is known as the Budget System.

A budget is an instrument through which the several operations involved in the administration of the financial affairs of the government are correlated, compared and brought under examination at the same time. It is at once a report, an estimate and a proposal. It is the document through which the Chief Executive, as the authority responsible for the actual conduct of governmental affairs, comes before the fund-raising and fund-granting authority and makes full report regarding the manner in which he and his subordinates have administered affairs during the last completed year; in which he exhibits the present condition of the public treasury; and, on the basis of such information, sets forth his program of work for the year to come and the manner in which he proposes that such work shall be financed.

Practically all of the essential features of a sound budget system are to be found in the McCormick Bill, and to a lesser degree in the Good Bill; and it is, therefore, unnecessary to take up the time of the Committee in presenting these essentials with which you are already so familiar. May I, however, make one suggestion insofar as the report feature of the budget statement is concerned?

Mr. W. F. Willoughby suggests on page 8 of his book, entitled "The Problem of a National Budget," that the financial statements should be accompanied by the administrative reports of the Chief Exec-

[1] Argument on behalf of the National Tax Association before the Committee of the United States Senate on consideration of a National Budget, January 14, 1920 (see Hearings, Part I, p. 184).

utive, the heads of departments and other officers in charge of the several services of government. The suggestion seems to me to have considerable merit. Of course, he points out that the financial statements contained in the budget give and can give but the bare figures showing the financial results of the operations, and in order that their significance may be seen, it would seem to be essential that they should be accompanied by statements showing the results in terms of work accomplished or to be accomplished, the necessity or utility of such work, the problems that have had to be met, the methods that have been or will have to be employed, and so on. In other words, these administrative reports should furnish the means through which the figures are to be interpreted and may be understood.

One of the most important questions which you have to decide is where the budget bureau is to be placed. The Good Bill places it directly under the authority of the Executive, while your bill, Mr. Chairman, places it in the Treasury Department. On this particular point I do not feel justified in speaking for the National Tax Association, but according to my personal view, I very much prefer the plan proposed in the Senate Bill, provided that the many administrative duties of the Secretary of the Treasury, other than those connected with the collection of revenues, can be divorced from his department. I base my opinion on the following reasons:

First, it is logical and proper that the Secretary of the Treasury, as the chief financial officer of the Government, should be the real budget chief; and, in my judgment, no man holding an office lower than that of a Cabinet officer will be able to work effectively with other Cabinet officers and the various departmental and bureau heads. It is idle, of course, to expect that the President himself will have sufficient time at his disposal to give his personal attention to the departmental controversies, many of which will be as to matters of detail, and I am afraid that a mere bureau chief, unless he is a man of very strong character, will only too frequently give way before the insistent demands of the Cabinet officers. If this should happen, your whole system will break down, because Congress will begin to lose faith in the budget as submitted, believing that it does not represent the needs of departments pruned to bed-rock, but contains the old abuse of excessive estimates and demands.

While the test was not a fair one, we had some experience along these lines in New York, when a so-called "Executive Budget" was attempted, though I do not want you to understand that it was in any way a genuine attempt to set up a real budget system. There the budget was prepared by clerks in the office of the Governor. It was known that the Governor himself gave very little personal supervision to the revision of the estimates submitted by the departments, and as a result we in the Legislature knew that those estimates would have to be gone over with the same degree of care to which they would have had to be subjected, had they been submitted directly by the departments.

In the second place, if you put the budget bureau immediately under the Executive, you divorce the two essential parts that go to make up a complete budget. It will be the primary duty of the Director of Budget to prepare and submit the estimates as to the financial needs of government for the ensuing year, while the function of drafting plans for the provision of the means with which to satisfy those needs will remain the responsibility of the Secretary of the Treasury. In other words, you place the responsibility for estimating expenditure in one man and the responsibility for formulating and submitting suggestions for necessary revenue measures and desirable taxation reform in another; unless, of course, you mean to deprive the chief fiscal officer of the Government of what should be one of his primary duties. It is almost essential that the consideration of the needs of government should not be divorced from the consideration of the means at hand and the new measures necessary to meet those needs. That revenues and expenditures should balance every year is but a sound business proposition. This is almost invariably true of Great Britain, where responsibility is located in a single head, and invariably untrue in this country under our existing system.

For every fiscal year from 1866 to 1893, inclusive, there was a surplus of receipts over expenditures. During this period of 28 years the surplus of receipts over expenditures totaled $1,920,205,

013.41. For the fiscal years 1894 to 1899, inclusive, the expenditures exceeded the receipts in the aggregate of $283,022,991.14. For the fiscal years 1900 to 1904, inclusive, the surplus of receipts over expenditures aggregated $310,319,165.04. For 1905 the expenditures exceeded the receipts by $18,753,335. For the fiscal years 1906 and 1907 the receipts exceeded the expenditures by $156,733,047.85. For the fiscal years 1908 and 1909 the expenditures again exceeded the receipts by $78,776,622.30. For the years 1910 to 1914, inclusive, the receipts exceeded the expenditures by $149,024,404.27. For 1915 the expenditures exceeded the receipts by $33,488,931.53. For 1916 the receipts exceeded the expenditures by $55,171,553.59 and for 1917 there was a deficit of $29,724,864.73.

From 1866 to 1917, inclusive, the receipts exceeded the expenditures for each year with the exception of 1894, 1895, 1896, 1897, 1898, 1899, 1905, 1908, 1909, 1915 and 1917. The total amount by which the expenditures exceeded the receipts for these 11 years just named is $443,766,744.70. For the 52 fiscal years, 1866 to 1917, inclusive, the receipts exceeded the expenditures in 41 years, the total of such excess for that period being $2,591,453,184.16.

Moreover, with the increasing burden of taxation, not only federal, but state and municipal, with the increasing reliance of the federal government on direct taxes and its consequent invasion of the resources of the states, with the increasing complexity of the whole tax problem due to our federal system of government, it seems to me highly desirable to make the Secretary of the Treasury in every sense the chief fiscal officer of the Government, placing upon him the responsibility, not only of supervising expenditures, but of studying our entire taxation and revenue system, with a view to removing injustices, unsound measures and making suggestions to Congress for the establishment of a sound, well-rounded system.

I should like to make one or two further suggestions. Referring to Section 4 of the McCormick Bill, it seems to me that the budget officer in each department there provided for might better be appointed by the Budget Director, the appointment, of course, to be approved by the head of the department. If he is appointed by the department head, it is difficult to see how he could exercise effective supervision over the preparation of the estimates of that department. He must and will be guided by the wishes of his superiors. If, however, he is appointed by the Budget Director, he will be the eyes of the Director in so far as that particular department is concerned, and will be in a position to furnish most valuable and needed information as to its needs, and will exercise a wholesome check on the desire to spend on the part of the department and its various administrative units.

It seems to me also that each house of Congress should have a representative in the office of the Budget Director, who could act as adviser to the house and senate Committees when the budget comes before them for consideration. Otherwise, they will necessarily become involved in the consideration of a great number of details, instead of devoting their time to matters of policy and major importance. I, of course, do not know what happens in practice in Congress, but I do know that when I served as a member of the Finance Committee of the Senate of New York State, the time of our Chairman and of the members of the Committee who attended the hearings was almost wholly taken up with the consideration of increases in individual salaries and the adding of a comparatively small number of officials to the various departments and bureaus. To me it was an appalling example of an unbusinesslike system, that one of the most responsible and experienced members of a legislative body should spend most of his time in deciding whether the salary of a stenographer should be increased five or ten dollars a month, and should become so lost in the multitude of similar details that he was unable to devote the necessary time and attention to the financial policy of the state. And a cure for this evil, if it exists here in any way to the same degree that it existed at Albany, is the creation of a permanent and adequate staff for each of the houses of Congress, with a direct representative in the office of the Budget Director.

In so far as the question of audit is concerned, I am inclined to agree with the provisions of the McCormick Bill, and to believe that it would be most unwise at the

present time to uproot the present auditing and accounting system of the Government. In this connection, may I suggest that the placing of representatives of Congress in the Budget Bureau would, to a certain extent, serve as an additional check upon improper expenditures.

And finally, I desire to join all of the other witnesses that have appeared before you in urging that to make these contemplated reforms effective, the rules of the House and Senate must be amended. The following changes, which have already been, I believe, submitted to you, meet our approval and we urge their adoption:

(1) That the budget as submitted by the President shall be considered by single committees of the House and Senate.

(2) That a definite time be set aside in each chamber for the discussion of the report of the single committee, such report to show in parallel columns the President's budget and changes recommended by the committee with the reasons therefor.

(3) That no legislative rider shall be attached to any appropriation bill and no appropriation rider shall be attached to any legislative bill.

(4) That no private bill for the expenditure of money shall be in order until after the respective chamber has acted upon the President's budget and the report of its single committee, and unless it provides the funds for financing the appropriation called for in such private bill.

(5) That a joint committee from each chamber shall be appointed to follow the expenditures of the executive departments and the money granted by Congress, with the power and the duty to examine, review and criticize every item of expenditure made, and to report to Congress annually, and at such other times as Congress, or any committee thereof, may demand.

(6) That Cabinet officers shall be given the privilege of the floor in both chambers, and be required to appear before the committee of the whole in either chamber whenever necessary, for the purpose of explaining or defending their estimates as contained in the President's budget.

RESULTS OF THE NEW TAX LAW IN INDIANA

JOHN B. PHILLIPS

Since March, 1919, the revised tax law of Indiana has been in force. The new act has been vigorously administered by a courageous state board of tax commissioners, which has made determined efforts to bring the assessments to the true cash value basis, as required by the law. The result of the state board's efforts is an aggregate valuation for 1919 of $5,780,480,039 as compared with $2,223,761,065 for 1918 when the old law was in force. The state tax rate has declined from 39.1 cents in 1918 to 18 cents in 1919.

The new law gave the state board of tax commissioners power to raise the valuation of any item or items of any class or classes of property in any township, city, or county. Pursuant to this power, horizontal percentage increases were ordered to be made to the valuation of large numbers of townships throughout the counties of the state. These increases were added to the valuation as returned by township assessors and county boards of review. The increases were different in the various townships and according to the different classes of property, some kinds of property being undervalued more than others. No horizontal increases were made to the assessment of intangible property.

While the horizontal increases have enabled the state board of tax commissioners to raise the valuation of the state to more than two and one-half times the figure for 1918, there is no question but that these increases have in a number of instances placed the assessed valuation above the true cash value. A considerable number of petitions from alleged over-assessed taxpayers asking for relief have accordingly been filed with the state board, but none of these petitions have been granted. Some litigation attacking the horizontal increases has been started in the circuit courts, but as yet the supreme court has not passed on the law.

From the decision of the supreme court of the United States in the case of the

Equitable Investment Company v. *The State Board of Equalization et al.* (Colorado), rendered December 20, 1915, it would appear that there can be no going back of the completed equalization. In the words of the court: "There must be a limit to individual argument in such matters, if government is to go on."

One of the features of the new law which has aroused some opposition is the provision that requires tax levies exceeding a total of one and one-half per cent in any taxing unit to be revised and approved by the state board of tax commissioners. In such cases the action of the state board is final. The law also requires bond issues to be approved by the state board and in case of amounts below $50,000, disapproval by the state board is final; but for amounts above this figure, an election is allowed, and the voters may by a majority vote, overrule the decision of the state board.

In consequence of these provisions, the state board has reviewed some three thousand cases of tax levies and bond issues. The board has been obliged to reduce the tax levies very considerably throughout the state, so as to comply with that provision of the new law which requires that the taxes levied in 1919 shall not exceed those levied in 1918, except by petition to, and approval by, the state board. The revisions and reductions in levies and the refusals to approve bond issues have been generally accepted quietly by the localities concerned. There have been some murmurs about the interference with local self-government, but the sponsors of the law point out the benefits to the taxpayers in the lower levies as a result of the state board's action. Rush county is cited as an example. In this county, the revision of local levies resulted in a reduction of taxes to the amount of $326,559.09 below the amount that the taxpayers would have had to pay had the levies as fixed by the local authorities been approved.

Likewise in the matter of bond issues, a considerable curtailment has been brought about. From March to November, the state board approved applications for bond issues amounting to $19,851,557.51 and denied petitions for $1,531,951.52. Petitions for $237,641 were withdrawn at the suggestion of the board.

One referendum has been held on the refusal of the state board to approve a bond issue. This was the case of a $60,000 bond issue for a gymnasium at Columbus. The board's disapproval was sustained by a vote of 654 to 119. It was clear that the taxpayers did not want the gymnasium.

It is reported that among the greatest objectors to the centralized control of tax levies and bond issues are those who supply road material and machinery, and generally, firms which sell supplies to county and other officers.

While it is quite generally believed that the new law has brought about a decidedly superior equalization, there is a feeling that the strong centralized power, now possessed by the state board of tax commissioners over local tax levies and bond issues, should be somewhat reduced. The law is being attacked on this ground by some of the candidates for governor. The Republican state chairman, however, whose party is responsible for the law, claims that it is steadily gaining in favor and is now a party asset.

SUCCESSION DUTIES IN NEW BRUNSWICK AND OTHER CANADIAN PROVINCES

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So far as the legislative authority of the province extends, the New Brunswick Succession Act imposes a duty on its "passing at death" upon the entire estate of a resident decedent; in fact, the only portion of such an estate that can escape the tax is the real estate located without the province. According to the old principle of *mobilia personam sequuntur* all moveable or personal property of every description included in the estate of a resident decedent is located within the province; the

act distinctly declares liable to taxation "all property situated outside the province belonging to a deceased person domiciled therein, all simple contract debts due to a person domiciled within the province notwithstanding the debtor may reside outside the province, all specialty debts although the instrument creating or evidencing the same is without the province."

All stocks, shares, dividends, warrants, script debentures or other evidences of debt are dutiable no matter if the head office or place of transfer is outside the province.

So far, the act follows the English succession law in fixing the situs of personal property on the principle of domicile. In the case of a non-resident estate, however, the domicile principle is abandoned and that of independent situs is substituted. Bonds, shares, debentures, or stock of any New Brunswick corporation or bank are taxable on the principle that the physical property or place of transfer is within the province and no transfer agent is permitted to make a transfer of property, passing at death without first seeing that the duty has been paid. Further, where a successor lives within the province the amount of an estate passing to him is dutiable although it may consist of personal property physically situated without the province of an estate of a decedent domiciled without the province. In other words, an estate or any part thereof, which can be regarded within the province by either method of fixing situs, is liable to double taxation when it passes to a non-resident successor.

It is clear that any act drawn on these principles aims simply to tax all the property it can possibly bring within the jurisdiction of the province, without regard to the rights of individuals or to comity to other provinces or states. Unfortunately other provinces have similar inconsistencies although happily not quite to the same extent. Alberta places a slightly higher rate upon the amount going to non-resident than resident successors, and Saskatchewan, in its revised act, seems to have followed closely the wording of the New Brunswick statute in its effort to tax all property that could possibly be brought under its taxing jurisdiction.

Quebec determines situs by the principle of domicile, in the case of the estates of resident decedents but in other cases establishes, wherever possible, jurisdiction on the principle of independent situs. Moreover the rates of taxation in this province are high when compared with most of the other provinces and many of the Dominion-wide corporations of Canada have their head office in Montreal. Although the Succession Act of Quebec contains the usual reciprocity feature whereby through agreement with other provinces, double taxation of the citizens of each may be avoided to considerable extent, the administration of this province has made little concession under this section, evidently preferring the increased yield of the act to any avoidance of double taxation.

The Act of Ontario in its present form is least objectionable with respect to provincial jurisdiction. The law provides for the taxation of all property "situate in Ontario," leaving the courts to determine what property is so situated. The Administration recognizes to an extent the jurisdiction of other provinces since it allows Ontario citizens a rebate from the amount of the tax imposed by Ontario equal to the full amount of the tax paid to another state or province upon that part of the estate situated within its boundary; provided that in no case shall the amount so rebated exceed the amount of the tax imposed by Ontario upon the same property. The chief administrator of this act told the writer that under the conflicting views of jurisdiction, Ontario acted on the consistent principle of taxing the property within its sphere as the courts should decide and protected its own citizens from double taxation, whether it secured reciprocal treatment from other provinces or not, leaving other provinces or states to protect their own citizens.

It is evident that some consistent principle of provincial jurisdiction that will be fair to provinces and individuals, must be accepted and embodied in all provincial Succession Acts if satisfactory and effective taxation of inheritances is to be obtained. So long as each province disregards the rights of citizens of other provinces and the comity of states in its legislation, just so long can we expect double taxation of some estates, under-taxation of others, irritation, and in general, ineffective taxation. The existing reciprocity clauses in provincial acts do not meet the situation; what is needed is the common adoption of a consistent principle in the delimitation of

provincial jurisdiction that will give to each province its rights and secure the full taxation of each succession without double taxation upon any. That principle should be either the thoroughgoing adoption of the *mobilia personam sequuntur* principle, in determining situs or else the adoption of some common method of determining independent situs in the case of each class of property and the working out of the latter with considerable clearness and detail.

There is much to commend the acceptance of the principle recommended by the Committee of the National Tax Association upon Double Taxation and Situs; namely, that "each state should levy its inheritance tax only with reference to such property as devolves according to its law," which is indeed the principle embodied in the British Succession Duty and was recently upheld by the Supreme Court of Canada in a decision in the case of *Smith* versus the *Provincial Treasurer of Nova Scotia*. This case was brought before the courts because the province of Nova Scotia sought to collect duty upon 2076 shares of Royal Bank stock, which Smith, domiciled in Halifax, possessed at the time of his death. Since, under the provisions of the Bank Act, these shares must be tarnsferred at the branch office of the Bank in Halifax, and not in the head office of the Bank in Montreal, the provincial government claimed that they were liable for Succession duty because the situs was in the province and "not elsewhere." On the other hand, the trustees of the Smith estate claimed that this property might also be liable to duty in Quebec, because the head office of the Royal Bank was situated in Montreal. The Supreme Court of Nova Scotia sustained the contention of the province, that since the shares could "be effectively dealt with" at the branch office of the Bank in Halifax, the property had its situs at that place. The Supreme Court of Canada sustained the decision of the lower court but not upon the same ground; in fact the Judges differed upon the question whether on the basis of independent situs, Montreal or Halifax could claim the estate, but a majority ruled that the property was taxable in Nova Scotia because Smith was a resident of that province and according to the principle of *mobilia sequuntur personam* its situs was the domicile of the decedent.

The Court drew a distinction between succession duties and estate and probate duties in this respect, claiming that for purposes of succession taxation, the situs of personal moveable property is determined by the domicile of the decedent owner. This decision makes clear that each province may place a succession duty upon the transfer of the entire estate of a resident decedent, with the exception of real estate located without the province, but it does not in itself absolutely decide that another province might not tax the same property or the part thereof that it may claim as located within it on the basis of independent situs. It is true that there were implications in the opinions of at least two judges, that would seem to imply that for purposes of succession taxation, property can have but one situs. The British North American Act makes it clear that a province can only impose direct taxation and that only upon property within it, and these judges held that property situated within a province must be interpreted according to the law of England at the time of the passing of the act of confederation. Further, Judge Anglin stated that he strongly dissented from the view that any provincial legislature, so restricted by the constitution, could by its own enactment, give situs within the province for the purpose of taxation to property which by the general laws of the province, had its situs elsewhere. It is understood that this case is to be carried to the Privy Council. If the decision of the court is sustained, then another decision is still needed. Should the Supreme Court decide that for purposes of succession taxation, property can have but one situs, then the jurisdiction of each province would be determined by a consistent principle.

But for some purposes, at least, classes of intangible property have been given a situs in our courts independent of the domicile of the owner. In a recent decision of the Supreme Court of New Brunswick it was declared with reference to *mobilia personam sequuntur* that it "is a fiction not of universal application and yields whenever for purposes of justice the actual situs of property should be examined." According to this court, it is a principle of comity generally allowed among states but

may be disregarded under certain conditions. Any province might, if it were willing so to offend the comity of states, condition by its legislation, the devolution of personal property in the manner that now obtains in real estate. Or, if the constitution should not permit a province to tax the succession of personal property physically situated within its territory, the same end might be accomplished by passing an estate instead of a succession tax act.

There is needed, therefore, some agreement between provinces with respect to provincial jurisdiction in inheritance taxation. Naturally, provinces with wealthy residents prefer the limitation of jurisdiction according to the principle of domicile, whereas provinces, like Nova Scotia, that have considerable outside capital invested in large industries, contend that property for inheritance taxation should have its situs where it is transferred or "effectively dealt with." The suggestion of Mr. Masters, the Deputy Attorney-General of Nova Scotia, to the writer, that each province should enact both an estate and a succession duty act, might offer a solution of the problem. The two rates might be so adjusted that the entire tax need not be heavier than the present one. By enacting both laws we could follow the British procedure in determining situs for estate taxation on the basis of physical location or transfer and for succession duty on the principle of domicile, thus respecting the rights of the province of the decedent owner and the rights of the province where the physical property or the office of transfer is actually located. Since all estates would be subject to both taxes, all unequal taxation would be avoided. Moreover, in the estate duty the rate should vary according to the aggregate amount of the estate, whereas in the succession act the rate should be graduated according to the amount passing to each successor and according to the kinship of the successor to decedent.

The time may soon come when the federal government will impose an estate duty, and if so then provinces should impose a tax upon successions, with jurisdiction determined in each case upon the principle of domicile.

CONFISCATING CAPITAL AND INCENTIVE BY TAXATION

F. J. LISMAN

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Looking at it from every angle, an intelligent system of taxation is the most important public question in the United States. Proper taxation must bear more heavily on the rich than on the poor, and it should be levied in such a way as to cause the minimum amount of friction between the citizen and the government and the minimum amount of expense to the government. An effort must also be made to devise a system of taxes which will not be passed on to the consumer in a burdensome way. At present every manufacturer of raw material of course includes the tax in his cost and adds his percentage of profit to the tax, as well as to the cost of labor, etc. The same thing is done with every article of manufacture and every step in distribution, so that finally the ultimate consumer, which is all of us, pays an advance in price equal to three to five times the amount of the tax. Suppose a business man, say a manufacturer of some necessary article, has been accustomed to make a profit of a hundred thousand dollars a year; he suddenly finds that he is to be taxed thirty-five thousand dollars on that profit; and as he does not want to make any less net income and as he cannot escape paying the tax, he strives to secure a larger profit than before—in other words, to make a profit of $1.60 or more where he was making $1.00 so that he may meet the accumulating surtaxes on the larger amount and still secure at least his former profit. He does this and passes the article with the price so loaded on to the wholesaler or jobber who, facing the same situation, meets it the same way, and the experience is repeated when the article reaches the re-

tailer, so that by the time the article reaches the retail counter it has been loaded three times to meet the taxes of the three classes of traders. This is not very lovely, but it is human nature, and if such a course has not been followed by all it has, without doubt, been followed by many, and in following that method of passing the tax along the loading is always more than the amount of the tax.

The most economical tax to the consumer is a direct tax, but human psychology is such that people resent such taxes. The majority of people are grossly ignorant of political economy and do not realize that the direct tax is much more economical than the indirect tax. A man would resent paying a twenty-five cent tax to the government whenever he purchases a $5 hat, but when he is asked to pay $6 instead of $5 he shrugs his shoulders, talks about profiteering but does not find fault with the government. In view of this peculiar mental attitude, based, of course, on ignorance, our law makers have, and will continue, to avoid a system of direct taxation which will bear directly on the masses. In other words, a very large majority of the voters do not want to pay a direct tax, therefore Congress is not going to impose such a tax. Owing to this sentiment and the urgency of additional taxes during the war, the present system of income tax, super tax and profit tax has been evolved, which produces the results to the government and is largely responsible for the high cost of living.

It is not unusual to hear men in the uptown hotels and theatres state that their expenditures are being charged up to the cost of doing business, either to entertainment or traveling account and that therefore the government is paying from 50 per cent to 85 per cent of this.

Taxes on profits have also confiscated the incentive to enterprise.

Business men who are considering new enterprises figure that if the chances of profit are two to one in their favor, in the end they would probably not be gainers because taxes would be likely to absorb all the profit. The new capital which is required from year to year can only come from surplus earnings of the companies or the savings of the community. The government is now taking a large proportion of this surplus and savings by taxation, and is on the other hand encouraging extravagance. Everyone is preaching greater economy while the tax laws are encouraging extravagance and the government is the greatest leader or horrible example in extravagance.

It is unquestionably a conservative statement that one-half of all surplus earnings of our large corporations and the bulk of the smaller ones go into improvements, being used to create additional facilities for production and employment. The profit tax is a strictly socialistic measure because it confiscates new capital while it is being created.

There would appear to be a simple, direct and forceful remedy for all this: that is a law which would put a penalty on extravagance and a premium on saving and economy. It has been previously pointed out in these articles in *Commerce and Finance* that the idea of political economy of the man in the street is very hazy. The average man believes that any one who has an income of $100,000 and spends only $10,000 is a miser. As a matter of fact a man who saves $90,000 adds that much to the available capital of the country, provided it is not taken away from him by taxation. This $90,000, unless hoarded in actual cash in a safe deposit vault, is bound to be of benefit to the community. The man may either buy securities with this money, and the proceeds of these securities may be used by the corporation for the purpose of providing transportation or manufacturing facilities, which will give employment to labor and thus increase distribution. If the $90,000 is merely deposited in some bank, the bank will lend this money to some one who is engaged in business and thus facilitate production or commerce. The aim of taxation therefore should be to create more capital.

Mr. Victor Morawetz in his writings has for many years advocated a "habitation tax," that is, a system by which every one should be taxed in proportion to the amount of rent paid by him, or in proportion to the value of the premises occupied for residential purposes. The theory of this system of taxation is that personal expenditure for rent is a fair estimate of the general standard of living and that the tax should be levied accordingly. A person with more than one dwelling should be

taxed additionally. Mr. Morawetz also suggests a tax on servants. Anyone employing one servant can easily afford to pay $50 a year; anyone employing two servants should pay an extra $100 for the second servant and possibly $200 for the third servant. People with more than one house should pay a heavier tax on the second and a still heavier one on the third. Everything which amounts to wasteful consumption of goods or labor should be discouraged in these times and is a legitimate source of taxation.

Unquestionably the best way to enforce such a system of taxation would be to allow each adult person an annual tax exempt expenditure of $1,000 per capita and allow $500 exemption for every minor; expenditures above this amount to be taxed. Possibly a fair tax would be 2½ per cent per capita for each additional $1,000 spent in any one year, up to say $10,000 or $5,000 respectively, and to increase this tax progressively by 5 per cent on every $1,000 above $10,000 up to $20,000, until finally a tax of 75 per cent would be payable by every one spending over $20,000 per capita. Contributions to eleemosynary or public purposes should be exempt. We have devised a very complicated system of taxing income; surely a method of working out proper taxation on expenditures can be solved. This expenditure tax should take the place of all income, super and profit taxes. I believe a meticulous watch would then be kept on expenditures because people would dislike giving up 75 per cent for every $1,000 of additional expenditures.

The amount of capital accumulated in this manner would be tremendous and would rapidly put the United States in a position of supplying capital to the rest of the world. This does not mean that the money would have to be shipped out of the country, but this capital would be expended in the shape of manufactured goods. Such a system of taxation should certainly be popular with Congress, because it would bear very lightly on the majority of people. In most cases this expenditure tax would be no greater, probably less, than the present income tax. To a family consisting of husband, wife and two children and spending $5,000 a year, the tax would be but $75; that is, they would be exempt to the extent of $3,000 and would pay $25 on an expenditure of the first $1,000 and $50 on an expenditure of the second $1,000. If such a family were to spend $10,000 they would pay $720 in taxes, which could hardly be considered burdensome.

Such a system of taxation is undoubtedly novel, but it comes within the requirements of a proper system of taxation and should not meet with the resentment of anyone. Let Congress, therefore, consider this, and put the experts to work for the purpose of enacting a law which cannot be evaded and which will have plenty of teeth in it.

People who are in the habit of keeping close account of their expenditures do not spend their money thoughtlessly; therefore, a law which compels people to keep accounts would certainly be beneficial. The law might very properly provide that any part of a person's income that is not properly accounted for in the income statement should be deemed to have been used for personal expenditures. Taxes of the large taxpayers might be payable monthly or quarterly, with a final accounting at the end of the year. It might be found that thousands of working men, especially floaters, would escape such a system of taxation, but as a matter of fact many of this class are now earning from $2,000 to $5,000 a year and it is doubtful whether 1 per cent of these people are paying any tax at present.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

STOCK DIVIDENDS NOT INCOME.—As we go to press the long-looked-for decision in the so-called stock dividend case is announced. We are unable to do more than merely note that the opinion is, if anything, even more decisively against the claim that a stock dividend is income, than that rendered by Justice Holmes in the case which

arose under the 1913 income tax law. And strangely enough, that Justice now is ranged with the minority in the present case.

We are pleased to announce that this decision and its bearing will be fully discussed at the master hand of Professor Thomas Reed Powell in the next issue of the Bulletin. — *Eisner* v. *Macomber*, U. S. Supreme Court, March 8, 1920.

Income Tax — Non-Resident — Due Process—Discrimination—Collection. —In two decisions rendered March first, the United States Supreme Court has done much to clear up questions heretofore in doubt, and of the greatest importance in the development of state income taxation. These questions relate to the extent of jurisdiction which a state possesses to tax incomes of non-residents, the necessity of avoiding discrimination as against them, the legal justification of the tax when levied upon the non-resident, and finally to the limitations upon its effective enforcement.

The cases involved the income tax laws of Oklahoma (Laws 1915, Ch. 164) and of New York (Laws 1919, Ch. 627), both of which provide for taxes upon non-residents, the former applying to their entire income derived from sources within the state with the same personal exemptions as are allowed residents; the latter applying to only a portion of the non-residents' income derived from sources within the state and allowing no personal exemption.

Both laws were attacked on various constitutional grounds as denying due process and equal protection, the attack upon the New York law being virtually confined to the claim of repugnance to Section 2 of Art. IV of the federal constitution by discriminating against non-residents through the denial of the personal exemption allowed residents.

The decisions are somewhat mutually interdependent and may profitably be read together, and it will be found most informing to first review that with reference to the Oklahoma law which discusses certain fundamental questions which apply equally to both laws. In this case, a resident of Illinois was the owner of oil and gas leases and of the fee in certain oil-producing land in Oklahoma. He was engaged in the business of producing oil from such properties from which during 1916 he received a net income exceeding $1,500,000, of which he made return under protest and was assessed an income tax in excess of $76,000. The protest being overruled, he brought suit to enjoin collection. His petition was denied by the District Court (*Shaffer* v. *Howard*, 250 Fed. 873) and an appeal was taken which was dismissed for want of proper parties (249 U. S. 200). After such dismissal, another warrant was issued and the sheriff, having threatened to proceed to levy upon and sell plaintiff's property, this action was commenced; an application for interlocutory judgment was denied upon the authority of the previous decision of the District Court and this appeal followed.

The local questions as to whether plaintiff had an adequate remedy at law under the Oklahoma statutes were decided in his favor, the court holding that the remedies related in the one case to the correction of an income return and not to the case of one contending that the law itself was invalid and in the other, to relief from *ad valorem* taxes and not from income taxes. (See *Berryhill* v. *Carter*, 185 Pac. 93, and *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503.)

The court held further that, regardless of these questions, and even assuming the tax legal, the claim of denial of due process arising from the asserted invalidity in procedure to collect the tax, by imposing a lien upon property from which the income taxed was not derived, raised in itself a question which authorized the resort to equity where all questions would be disposed of (*Camp* v. *Boyd*, 229 U. S. 530, 551; *McGowan* v. *Parish*, 237 U. S. 285, 296).

Upon the merits, the court proceeded to discuss the two main contentions raised under the "due process" clause: first, that the state was without power to levy the income tax upon non-residents, and second that the lien was invalid because imposed upon all of plaintiff's property without regard to its relation to the production of his income.

The court disposed of the first contention by reference, as it says, to "fundamental principles". Governmental jurisdiction to tax, like the judicial function, depends upon the power to enforce the mandate by action taken within the state, either *in personam* or *in rem*, according to

the circumstances of the case, as by arrest, seizure of property, garnishment of credits, sequestration of rents or profits or the like, and the jurisdiction remains even though all measures permissible be not resorted to (*Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 353; *Ex parte Indiana Transportation Co.,* 244 U. S. 456).

In our system, the states have general, and except as limited by the federal constitution, complete dominion over all persons, property and business transactions, within their borders. They are not restricted to property taxes nor to any particular form of excises. Property has value chiefly for what it is capable of producing and man's activities are devoted largely to making recurrent gains from the use of property and the employment of human skill and labor.

That the state which protects and secures property and makes gainful occupations possible is debarred from exacting a share of those gains in the shape of income taxes "is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement", is "wholly inadmissible".

Income taxes are a recognized method of distributing the burdens of government, favored because obtained from those deriving pecuniary benefits under the protection of government and because readily proportioned to ability. Such taxes were imposed by several states shortly after the adoption of the federal constitution (N. Y. Laws, 1778, ch. 17; Report of Oliver Wolcott, Jr., 1796; Am. State Papers, 1 Finance, 423, 427, 429, 437, 439).

The states have always been accorded the widest liberty in taxation and their power extends to every object brought brought within their jurisdiction (*McCulloch* v. *Maryland,* 4 Wheat 316, pp. 428-429; *Michigan Central Railroad* v. *Powers,* 201 U. S. 245, pp. 292, 293; *State Tax on Foreign-Held Bonds,* 15 Wall. 300, 319; *Am. Mfg. Co.* v. *St. Louis,* 250 U. S. 459, 463).

Just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions sustaining state taxation of credits due to non-residents (*New Orleans* v. *Stemple,* 175 U. S. 309, 320; *Bristol* v. *Washington County,* 177 U. S. 133, 145; *Liverpool etc. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354) and federal taxation of the income of an alien non-resident (*DeGanay* v. *Lederer,* 250 U. S. 376).

That a state may not prohibit a non-resident from carrying on business within its borders is a very reasonable ground for subjecting such non-resident, although not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed upon residents. Section 4 of Article IV entitles the non-resident to the privileges of a citizen but not to entire immunity from taxation nor to preferential treatment as compared with resident citizens. It does not entitle him to be favored by discrimination or exemption (*Ward* v. *Maryland,* 12 Wall 418, 430).

Oklahoma has not assumed to tax non-residents on income derived from property or business beyond her borders, thus following the similar practices embodied in the various federal income tax statutes as to non-resident aliens, as to the validity of which no doubt now exists and so far as the question of jurisdiction is concerned, the due process clause of the 14th amendment imposes no greater restriction upon the states than the corresponding clause of the 5th amendment imposes upon the United States.

The argument that an income tax is by nature a personal tax or a "subjective" tax imposing personal liability upon the recipient and hence that it is not applicable to a non-resident for lack of personal jurisdiction, is declared to be a mere question of definitions and has no legitimate bearing upon any question raised under the federal constitution. When interpreting that instrument, the question must always depend upon the practical operation and effect of the tax and not upon the mere question of form (*St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 362). The practical burden imposed upon

the net income of the non-resident derived from business carried on in the state is certainly no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose.

The fact that personal skill and management was exerted by the plaintiff at his residence in Illinois did not deprive Oklahoma of jurisdiction to tax income arising in the state, whose authority to tax operates *in rem*. At most, it raises the question whether the expense of management exerted in Illinois might not be a deductible item.

Violation of Section 2 of Article IV was asserted by the judge who dissented below upon the ground that since the tax as to citizens of Oklahoma was a purely personal tax while as to non-residents it was a tax upon property and business, to which the property and business of residents was not subjected, there was a discrimination against non-residents. The court rejected this contention as paying too much regard to "theoretical distinctions and too little to the practical effect and operation of the two taxes." In effect, citizens are subjected at least to the same if not to greater burdens, as they are taxed not only upon income from their business and occupations but in addition upon their income from outside sources.

The claim of violation of the commerce clause was easily rejected upon the authority of the *Crew Levick* case, 245 U. S., and of *Glue Company* and *Peck* v. *Lowe*, 247 U. S.

The claim of double taxation arising from the gross production tax imposed in Oklahoma was rejected upon the ground that as a matter of construction, that tax was designed as a substitute for *ad valorem* tax and not for income tax. Furthermore, it is observed that even if it should be akin to double taxation, that would not render the income tax obnoxious to the federal constitution, as nothing in that instrument or in the 14th amendment prevents the states from imposing double or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 367-368.

The contention was made of want of due process arising from the attempt to enforce the tax upon all of plaintiff's property regardless of its relation to the production of the income taxed. This claim was stated by the court to amount to the assertion that the state was without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded or that a lien for an income tax might not be imposed upon a non-resident's unproductive property nor upon any particular productive property beyond the amount of the tax upon the income derived from that property.

It was held that the facts did not support the claim but that all of plaintiff's property was used and managed in the one business of producing oil and that his income in Oklahoma was derived from that one business, that the lien would rest upon the same property interests which were the source of the income, that the only jurisdiction sought to be asserted was over plaintiff's property and business and the income that he derived therefrom, a jurisdiction *in rem*, and that the state properly treated his property interests and business as having both unity and continuity.

The purpose to impose income taxes was declared in the state constitution, and the precise nature of the tax and the measures for collection were plainly stated in the act, plaintiff having proceeded with notice of this law to conduct the business out of which the income taxed arose, the state did not exceed its power in enforcing payment of the tax by the lien, to be followed by execution and other appropriate process.

In the New York case the questions were somewhat simplified by the elimination of all questions of fact and by the abandonment, upon the argument, of practically all questions of law other than the single question of whether the failure to allow the personal exemption to non-residents constituted a violation of section 2 of Article IV of the federal constitution.

The question arose through a suit instituted by a withholding agent charged under the law with the duty of withholding a percentage of the payments made by it to its employees — residents of Connecticut and New Jersey—by way of compensation for services rendered in the state of New York. The lower court had granted the injunction and the state appealed.

Here, as in the Oklahoma case, objection was raised upon the broad ground of

lack of jurisdiction, which was answered by reference to the decision in the Oklahoma case as holding that the state had jurisdiction to impose a tax upon the incomes of non-residents arising from business or occupation carried on within its borders "enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent)."

The withholding provision was held not in any wise to increase the tax upon non-residents but to merely recognize the fact "that as to them the state imposes no personal liability and hence adopts a convenient substitute for it" (*Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 239).

The objection urged against the burden imposed upon the withholding agent, was held not just ground for complaint or an unreasonable regulation of its conduct of business in the state.

The purposes of the constitutional provision under discussion were referred to as interpreted in *Paul* v. *Virginia,* 8 Wall. 168, 180, and in *Ward* v. *Maryland,* 12 Wall. 418, 430, from which cases extracts were quoted, emphasizing the freedom from discriminatory action to which non-residents are entitled.

The discrimination under the New York law was described as substantial when its practical operation as between resident and non-resident employees, working side by side, was observed.

It was held not to be a case of casual or accidental inequality as in *Amoskeag Bank* v. *Purdy,* 231 U. S. 373, 393-394, and *Maxwell* v. *Bugbee,* 250 U. S. 525, 543, but a general rule of inequality favoring residents. The exclusion of income from bank deposits and other intangibles owned by non-residents was held not to counterbalance the inequality nor was there merit in the contentions urged that the non-residents were not taxed on incomes in their home states and that the provision allowing a credit for income taxes paid in such states would operate to mitigate or remove the discrimination. This was held wholly speculative and it was further held that "a discrimination by the state of New York against the citizens of adjoining states would not be cured were those states to establish like discriminations" nor could "discriminations be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the constitution."

The decree of the district court was affirmed, thus virtually nullifying the whole operation of the law as to non-residents. The legislature, being in session, bills are being rushed to passage in the hope of saving the tax thus in jeopardy.

The reviewer looks with no little concern upon the whole program of non-resident income taxation, not only because of its doubtful expediency, but more because of his inability to see how a fair, thorough and effective system of collection is to be obtained. The difficulties of enforcing tax warrants for personal taxes against non-residents has long been recognized by the New York courts (see *N. Y.* v. *McLean,* 170 N. Y. 374; *Matter of Maltbie,* 223 N. Y. 227). If we are to have a repetition of the farce with respect to non-resident income taxes which has obtained with respect to personal property taxes, it would appear altogether better to resort to some other form of business taxes.

The taxes thus upheld, while in name income taxes, are quite apparently to be legally classified and enforced as business taxes, as will appear from a close reading of these decisions, which affords some relief from the strain which would otherwise be thrown upon personal income taxation. —*Charles B. Shaffer* v. *Frank C. Carter, State Auditor,* and *Abner Bruce, Sheriff of Creek County, Oklahoma,* and *Eugene M. Travis, Comptroller* v. *The Yale & Towne Mfg. Co.,* U. S. Supreme Court, March 1, 1920.

Income Tax—"Tax Free Rentals". —The ramifying results of a "tax free" covenant and its insidious and unlooked-for consequences, due to the imposition of income taxes, are seen in a recent decision of the Massachusetts Supreme Court. The lease in question was made before the passage of the federal income tax and under it the lessee agreed "as far as at any time permitted by law, to pay and discharge any taxes or excises which during the term may be lawfully levied, laid or assessed upon or against the rent payable hereunder whether levied or assessed upon the same

as rental or as income of any person or persons entitled thereto."

The lessee admitted that he was liable under this clause for the normal tax but contended that he was not liable for the surtax of the lessor. The court without much discussion, readily held that the tax was only an additional income tax; that it was immaterial that this mode of taxation came into existence after the date of the lease (*Welch* v. *Phillips,* 112 N. E. 651); that it was a direct tax which might be assessed on rentals as income (*Suter* v. *Jordan Marsh Co.,* 113 N. E. 580; *Codman* v. *Piano Co.,* 118 N. E. 344) and that the lessor was entitled to judgment.

Our curiosity was aroused as to how the amount of the surtax could be computed in such a case. Upon inquiry, we learned that the problem was solved through what appears to have been an unwise stipulation by the parties, that it should be such a proportion of the total surtax of the lessor, a person of large income, as the rental bore to the total income of the lessor. This evidently relieved the court from deciding a most difficult question and leaves that question for future decision.—*Kimball* v. *Cotting,* 125 N. E. 551.

Real Property—Buildings—Betterments—Equitable Relief.—A point of interest was involved in a recent decision by the Iowa court. In that state real estate is assessed every two years and it is provided that in the intervening year, real estate not included in and "buildings" erected since, the preceding assessment, may be assessed. An owner had laid in his building since the assessment thereof certain additional water pipes and galleries of a substantial amount. The assessor assessed these in the following year, and the question was whether they were "buildings". The court held that they were not such betterments as were contemplated by the statute, reasoning that the statute did not contemplate all betterments, such for instance as might arise from increase in values through special cultivation of a farm, the laying of drains, etc. It was further urged that the assessment could be sustained as for "omitted" real estate. This claim also was rejected as the betterments did not exist when the real estate was assessed, not being in existence, and hence they could not be termed "omitted". (*Richards* v. *Wapello Co.,* 48 Iowa 507.)

It was further urged that the owner should have appealed from the action of the assessor, and having failed to do so, he had no remedy in equity. The court held that as the action of the assessor was illegal, the challenge was wholly upon a question of law and that the judgment of the lower court in sustaining the demurrer to the petition to cancel the assessment *in toto* should be reversed. — *Des Moines Water Co.* v. *Hammil,* 174 N. W. 772.

Real Property—Federal Land Bank Mortgage—Remedy.—Real estate subject to a Federal Land Bank mortgage, was assessed at its full assessable value, without deduction for the mortgage. The owner, after appeal to the county board and denial of relief, paid the tax and brought suit to recover from the county under a statute allowing such recovery in cases where the property is "not liable to taxation" or "has been twice assessed in the same year and taxes paid thereon." The court, conceding argumentatively that the mortgage was exempt as against the bank and that under the Nebraska statute a mortgage was declared to be, for tax purposes, an interest in real estate and assessable in the first instance to the mortgagee, held that this did not bring the action within the statute as the land was "liable for assessment," the question being one of an excessive assessment, even though caused by failure to make a deduction on account of the mortgage. The remedy was by appeal to the Board of Equalization for abatement. The authorities cited as bearing upon the question are *Darr* v. *Dawson Co.,* 139 N. W. 852; *Davis* v. *Otoe Co.,* 76 N. W. 465; *Hicks* v. *Westport,* 130 Mass. 478 and 37 Cyc. 1184. The judgment of the lower court was affirmed.—*Janike* v. *Butler County,* 174 N. W. 847.

Corporations—Capital Stock—New York Law.—A decision of the Appellate Division of the New York Supreme Court lays down a principle relative to the assessment of capital stock, which is a departure from practices heretofore obtaining. Under the law the capital stock not exempt and the surplus exceeding 10% of the capital stock, are declared to be taxable, after deducting the assessed value of the real estate

and shares of stock owned in other corporations. The holding is that surplus as here used, means surplus computed after eliminating non-taxable property, so that while the corporation may have a substantial surplus, yet the property taxable in the state may not exceed its debts, and hence no surplus would be shown to be allowed as a deduction. The theory of the decision seems difficult of explanation and doubtless the case will be appealed. It is said to rest upon the intent of the legislature as interpreted in *Union Trust Co.* v. *Coleman,* 27 N. E. 818, and *People ex rel. Twenty-third Street Railway Co.* v. *Commis'rs,* 95 N. Y. 554, and upon the authority of *People ex rel. Citizens Illuminating Co.* v. *Neff,* 50 N. Y. Supp. 680. The deduction of all debts from a part of the assets, assuming that this even is the correct method, seems hardly reasonable.—*People ex rel. Federal Terra Cotta Co.* v. *Purdy,* 178 N. Y. Supp. 316.

Franchise Tax—Railroad in Hands of Receiver.—The appellate division of the New York Supreme Court held that the receiver of a leased railroad, operating such road pursuant to order of the court in an action to foreclose a mortgage, was operating the same under and by virtue of the franchise conferred upon the corporation by the state, and not the lessee, citing *Central Trust Co.* v. *N. Y. City, etc. R. R. Co.,* 18 N. E. 92; *People ex rel. Joline* v. *Williams,* 94 N. E. 1097.—*People ex rel. Kalbach* v. *State Tax Commission,* 178 N. Y. Supp. 486.

Corporation—Exemption as "Manufacturing" or "Mercantile" Corporations. — The New York corporation franchise tax based on net income, as originally imposed, applied only to "manufacturing" and "mercantile" corporations, other corporations being left under previous taxing statutes.

A corporation engaged in furnishing steel structures erected in place, in accordance with specifications of engineers or architects, claimed that it was a "mercantile" corporation because, as it purchased the steel and transferred title to it when erected, it in effect sold the steel, as the value of the steel was usually more than four times the cost of the labor of erecting the structure. The court rejected the contention, holding the corporation not a manufacturing or mercantile corporation.—*People ex rel. Post & McCord, Inc.* v. *Cantor,* 178 N. Y. Supp. 579.

Valuation of Bridge Company—Evidence — Arbitrary Action — Capital Stock.—A recent case involved the legality of the assessment of a bridge over the Mississippi river, made by the local assessors, and of the capital stock and franchises of the company owning the bridge, made by the state board of equalization. It was shown that neither the original cost, the reproduction cost or the capitalized income justified the assessment made of the tangible property. The court, while observing that a mere difference in judgment would not authorize a court to set aside an assessment, held that it did not seem possible by any reasonable process to arrive at the figure fixed or anywhere near that amount; that there was not only entire absence of proof to sustain the assessment but the evidence showed an overvaluation so excessive as to require the conclusion that it did not arise from an error in judgment but was arbitrarily and intentionally made, thus authorizing relief by a court. (*C. B. & Q. R. R. Co.* v. *Cole,* 75 Ill. 591; *Gaslight Co.* v. *Stuckart,* 121 N. E. 629.)

On the question of the valuation of the capital stock and franchises the court held that applying the rules of the board in such cases, of adding the capital stock and indebtedness and deducting the tangible property assessment, the result was far below the amount fixed; that the assessment was a mere arbitrary determination which had no basis in fact to rest upon, was an exercise of the will and not the judgment, which justified the relief sought. —*People ex rel. Little* v. *St. Louis Electric Bridge Co.,* 125 N. E. 280.

Inheritance — Legacies when "Vested".—By the Act of Congress of June 27, 1902, the Secretary of the Treasury was authorized to refund taxes upon legacies collected under the Spanish War Revenue Act of 1898, repealed by Act of April 12, 1902, upon contingent interests which had not become vested prior to July 1, 1902. An executor had distributed legacies prior to the expiration of the time for proving claims and prior to July 1,

1902, it being evident that a large sum would remain after paying debts. The claim for refund was based upon the assertion that these legacies so distributed had not become "vested" as being subject to possible recovery. The court declared that if the legacies had not been paid over prior to July 1, 1902, they would not have been vested, whatever the probabilities and however solvent the estate (*United States* v. *Jones,* 236 U. S. 106; *McCoach* v. *Pratt,* 236 U. S. 562), and it was urged that the same was true if they were paid before they could have been demanded as a matter of right. The court rejected this contention, holding that they became vested although subject to recovery; the remote possibility no more prevented their being vested in possession and thus subject to tax, than the possibility that a life estate might end at any moment, prevented one that began before July 1, 1902, being taxed at its full value, measured by the mortuary tables (*United States* v. *Fidelity Trust Co.,* 222 U. S. 158). The same conclusion was applied to one of the legacies from which the life tenant had received no income prior to the date in question.—*Henry* v. *United States,* U. S. Supreme Court, February 2, 1920.

Inheritance Tax — Deduction of Amount to Meet Undetermined Claims. — In a proceeding to fix the tax on an estate, the executor contended that a sum should be deducted from the assets to provide for two claims which were the subject of litigation, due to decedent's alleged liability. The Surrogate upheld the executor's contention, upon the authority of *Matter of Westurn,* 46 N. E. 315, holding that proper reservation could be made in the order providing for subsequent modification, upon the determination of the claims.—*In re Sicken's Estate,* 178 N. Y. Supp. 364.

Inheritance Tax — Remainders — Highest Possible Rate.—The will contained a provision that the trustees might in their discretion pay any part of the residuary estate to the life tenant. They might pay it all. Under the provision taxing the remainder at the highest possible rate, the remainder should be added to the value of the life estate in determining the rate of taxation.—*In re Howland's Estate,* 178 N. Y. Supp. 368.

Inheritance Tax—Revocable Trust Deed — Exemptions—Charitable Corporation — Evasion through Intermediary. — The doctrine of the New York courts that a trust deed, executed during the lifetime of the donor, containing reservation of the right to revoke the trust and recover the property, is taxable as a transfer to take effect at death, is referred to in a recent case as settled by the decision in *Matter of Bostwick,* 55 N. E. 208, and the seemingly contrary holding in *Matter of Masury,* 51 N. Y. Supp. 331, affirmed in 53 N. E. 1127, is explained.

The court held also that a trust deed in favor of the city of Duluth to provide a hospital, was taxable, as that city was not a "hospital corporation" and hence did not come within the exempt class.

Reference is made to another trust deed as the operation of an "ingenious mind" which if successful might have enabled the evasion of the tax and might, if countenanced, be the one most frequently resorted to as affording the "simplest method of avoiding the payment of the tax." The decedent gave funds to his son, a non-resident, who in turn executed the trust deed in question with provision that the income should be payable to the decedent during his life and on his death to his wife and on her death to the son, the grantor of the trust. The deed contained provision for revocation by both father and son. The son predeceased the father. The facts were developed through an action as to the disposition of the income. This trust was held to be in effect one by the father in which the son was a mere intermediary and was taxable.—*In re Miller's Estate,* 178 N. Y. Supp. 554.

Inheritance Tax — Deduction of Taxes Paid to Foreign States. — The Surrogate's Court of New York County has held that inheritance taxes paid to foreign states should be deducted from the legacies taxable in such states and not from the gross estate as an expense; that where the order or decree does not specifically state the amount of tax on each legacy, the tax should be deducted from the interests of the respective legatees in proportion to the amount transferred to each. The New Hampshire rule to the contrary, stated in *Kingsbury* v. *Bazeley,* 70 Atl. 916, was not followed, as the New York courts have held that foreign inheritance

taxes are not an expense of administration (*Matter of Penfold,* 149 N. Y. Supp. 918; 110 N. E. 499). Neither is *Matter of Hamlin,* 124 N. E. 4, helpful which held the federal inheritance tax a deduction as an expense of administration. To hold similarly as to foreign taxes would be unjust to the residuary legatee.—*In re Guiteras' Estate,* 178 N. Y. Supp. 559.

Inheritance Tax — Remote Contingencies. — The Surrogate's court of New York has held that the provision of the statute imposing the highest possible rate upon a bequest subject to certain contingencies, means a present contingency and not a remote possibility, as was claimed to exist in the instant case which was the dissolution or legal incompetence to take, of all of seven charitable corporations exempt from transfer tax.—*In re Upjohn's Estate,* 178 N. Y. Supp. 686.

Assessment when Made—Changing Basis of Assessment — Vested Rights. —The efficacy of the change made in Illinois from one-third to one-half full value as the basis of laying taxes was subject to a recent action. It was claimed that the taxpayer was entitled to have his taxes computed in 1919 upon the one-third basis, as that was the law when the assessors acted in that year; that the act which was passed to take effect July 1, 1919, could not be effective as to assessments theretofore made upon the old basis. It was held by a divided court that the assessments were not completed until the various steps had all been taken, including review by the Board of Review and equalization by the State Tax Commission, which was not until after July 1. The legislature had complete power to increase the taxes at any time without regard to previous taxes and this could be done by increasing either the levies or the fractional part of value to be taken as the basis; the fact that at the same session numerous other acts were passed reducing the levies, indicated that no greater tax was intended but that the intent was to increase the limitation upon indebtedness which was governed by a percentage of "assessed values". The value for such computation was held to be the fractional portion of full value fixed by the amended statute.—*People ex rel. Campe* v. *Board of Review,* 125 N. E. 274.

Undervaluation as Invalidating Assessment.—The Illinois Supreme Court holds in a late case that while as a general rule errors in judgment do not constitute ground for invalidating an assessment, where the undervaluation is glaring and so grossly out of proportion to the true value as to show that the assessor could not have been honest in his valuation, the assessment may be impeached for fraud and amounts to no assessment at all. The case disclosed that the taxpayer had been assessed for personal property at a small fraction of the actual value and the Board of Review was held authorized to enter assessments for back years as for omitted property.—*Lambrecht* v. *Wilson,* 125 N. E. 267.

Collection by Attachment — Collector's Warrant—Implied Repeal by Uniform Stock Transfer Act. — The Massachusetts Supreme Court has held that the passage of the Uniform Stock Transfer Act repealed by implication a prior statute giving the collector authority to levy upon shares of stock by leaving copy of his warrant with corporate officers. He must now proceed by a method consistent with the purposes of the Uniform Act. In this case, however, the injunction sought was denied on the ground that plaintiff would have adequate remedy at law for damages for the illegal act of the collector. — *Warr* v. *Hodges,* 125 N. E. 557.

Income Tax as Expenses. — In a recent Wisconsin case the court has ruled on a point of growing importance in the development of income taxation. The Wisconsin income tax law, as it stood at the time, after defining income for the purposes of the act, describes the deductions to be allowed, which include "other ordinary and necessary expenses" and "sums paid by such person within the year for taxes imposed by any other state of this Union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived." The taxpayer, a corporation, keeping its books upon an accrual basis, as permitted by the act, with the consent of the tax commission, in making up its return, deducted the federal income tax thereafter to be assessed on the income earned during the

period. The commission disallowed the deduction and this action followed. The court held that the deduction was not allowable under the language above quoted as a tax payment because under the Wisconsin constitution an income tax was not a property tax, and hence the payment made of federal income taxes was not a tax upon property or the "source", the *Pollock* case not being applicable (*Income Tax Cases,* 134 N. W. 673; 135 N. W. 164). The taxes contemplated as a deduction were those laid directly upon property. Another reason for this rejection was that the tax was not imposed by any state or subdivision thereof, or any territory or possession of the United States.

It was, however, further contended that the payment came within the provision quoted above as an "ordinary and necessary" expense of the business. The court expressed itself as having little difficulty in rejecting this contention also; first because taxes are not peculiarly expenses of transacting business; they are no more expenses of business than of "loafing"; they represent the price which every citizen must pay for the privileges and the protection of government. The man of leisure, drawing his income from investments, is subject to the tax as well as the man of business. The income tax is laid upon the individual in proportion to his ability to pay, is not, like the property tax, computed upon the value of his property; whether the income is the result of business effort or otherwise is in no sense material.

While thus reaching the conclusion that taxes are not specific business expenses, the court expressed recognition of the fact that of course "the business man in fixing his margin of profits, must take into consideration the tax burden" just as he must other expenses "which in no sense constitute an expense of doing business." It is also suggested that income, for the purpose of taxation, is not necessarily identical with income for other purposes, the declaring of dividends for example. It is to be determined in accordance with rules laid down by the statute and it may well happen that the application of such rules will not establish the real net income in every instance. The object is not to fix the real net income left to the producer thereof, but to arrive at a basis upon which the tax is to be computed. A more conclusive answer is, however, found in the fact that the statute expressly describes the specific taxes which are to be deductible and, having thus dealt with the matter, it must be deemed that the legislature intended that no other taxes could be deducted. This view is declared to be supported by the fact that in 1919 the legislature made provision for the deduction of federal income taxes.—*State ex rel. Stern Milling Co.* v. *Wisconsin Tax Commission,* 175 N. W. 931.

Income and Profits Taxes as Expenses.—While not made in a tax controversy, the observations of a judge of a lower court in New York, in passing upon the reasonableness of a gas rate, are of importance, through their bearing upon the conception of income taxation. The question was as to the propriety of a deduction claimed by the company on account of income taxes, in computing the cost of rendering the service. It would appear that in some way these taxes were claimed by the opponents to be excess profits taxes, just how or why does not appear. The remarks quoted in full are as follows:

> "The defendants contend that the federal income tax is an excess profits tax which may not properly be included as an expense of the company. It is the court's opinion that no excess profits taxes may properly be included as an expense. A profits tax in its very terminology implies a tax on profits as such. It is the amount reached after payment of all expenses and therefore cannot be treated as an expense. In the returns to the government, upon which the profits tax is based, assuredly the amount of tax is not included in the expenses of the business. The theory of this tax is that he who has secured the profits surrenders or returns a portion thereof to the government. Stated another way, the plaintiff must contribute to the government in common with others from its profits, as such, its share towards defraying the expenses of the war. It should therefore not be permitted to reimburse itself from its customers because of such contribution."

This expression of the theory and effect of income taxes, levied upon a business, especially a regulated business, will doubtless be challenged. The possible scope of the controversy is referred to by the annotator elsewhere in this issue of the Bulletin with the purpose of inducing a general discussion of this important matter. —*Jamaica Gas Light Co.* v. *Nixon,* N. Y. Law Journal, Feb. 14, 1920.

INHERITANCE TAX — DEDUCTION OF FEDERAL INCOME TAX NOT YET ASSESSED. —In reversing the lower courts, the New York Court of Appeals has established the doctrine that federal income taxes, covering a period from the beginning of the year to the date of death of a decedent, although not ascertained and not assessed until the following year, are deductible in fixing the inheritance tax. In this case, decedent died February 27 and his executor was therefore required to pay income taxes upon income arising from January 1 to that date. The court held the tax to be one levied upon the owner personally with reference to his income, to be paid by the owner or his representative, in this case his executor (*Brady* v. *Anderson,* 240 Fed. 665). The decision was distinguished from those denying the right to deduct federal estate taxes, because of the difference in the nature of the taxes, the estate tax being upon the share of the transferee less his share of the tax (*Matter of Sherman,* 179 App. Div. 497, *Aff'd* 222 N. Y. 540; *Matter of Bierstadt,* 178 App. Div. 836). For the same reason the decisions denying the deduction of property taxes assessed prior to the death of decedent but becoming determined by levy thereafter, were distinguished, because in such cases there was no indebtedness, even the rate not being fixed. Until the tax had been levied, no legal charge could rest upon the estate or become a lien upon the property (*Matter of Freund,* 143 App. Div. 335, Aff'd 202 N. Y. 556). In this case the charge was directly created by Act of Congress payable at a fixed rate.—*Hazard et al.* v. *Travis, Comptroller,* 226 N. Y. 26.

BOOK NOTICES

FEDERAL INCOME TAX — WAR PROFITS AND EXCESS PROFITS TAXES, INCLUDING STAMP TAXES, CAPITAL STOCK TAX, TAX ON EMPLOYMENT OF CHILD LABOR. George E. Holmes of the New York Bar. Indianapolis, The Bobbs - Merrill Company. 1920. 1151 p.

The task of adequately reviewing this exhaustive work of a fellow member must be left to others. Our purpose will be accomplished if we are able to describe the scope of this revised and enlarged edition of a book which has already secured such definite recognition as a standard for reference upon the processes involved in interpreting and understanding the various federal tax laws.

The book appears this year in greatly enlarged form and thus reflects the development of that body of law and precedent which are rapidly accumulating and which go far to solve many of the difficulties surrounding the federal statutes.

The plan of the author is that of the lawyer rather more than of the accountant or the economist and is characterized by a treatment peculiarly practical and in an evident purpose to not only explain the obscurities but to deal with the entire subject from the standpoint of one in sympathy with the general purposes of federal taxation, seeking to encourage a spirit of cooperation in its interpretation and administration, but who does not hesitate to make vigorous and effective criticism of statute or ruling where they work injustice or deny rights. The special qualifications of the author, through early contact with the original statute of 1913 and through continuous and detailed application to its most exacting and obscure provisions, in the course of important professional practice, make the treatment of peculiar helpfulness to those whose experience has been less exacting and more casual and superficial.

The subjects are covered in 47 chapters, 42 of which deal with the income tax, the remaining chapters being devoted to the war profits and excess profits tax, the capital stock tax, the stamp tax, the tax on child labor, with a final chapter on the construction of taxing statutes in general. An appendix contains important and valuable special discussions and tables covering interest deductions of corporations, methods of estimating recoverable underground reserves of oil, with graphs, depreciation in the oil and gas industry, forms and schedules in use by the oil and gas section and the mines and mineral section and those designed for the timber industry,

and illustrations of computations of excess profits taxes. The revenue Act of 1918 (quoted in full), an exhaustive table of cases with reference to the pages where they are discussed in the text and a subject index of 100 pages, complete the volume.

This statement in outline will obviously indicate the completeness of treatment. A reference to the individual chapters would involve us in much detail. The chapters on the income tax follow the logical order of defining the different taxable entities; income in general, with separate chapters on the different kinds of income; deductions; credits; accounting and returns; assessments; payments; abatement and refund; collection and information at source; constitutionality of the law. The excess profits tax is discussed in detail, as are the other taxes above mentioned.

The wealth of citation to the decided cases, appearing in the text or in the footnotes, often in detail, and the definite reference to official regulations or to unofficial rulings in individual cases, upon each point under discussion, serve to surround the text with further explanatory and clarifying matter of significant importance.

Besides a general revision, extending throughout the volume, with much new matter added, entirely new chapters appear in this edition on personal service corporations, normal tax credits and personal exemption and methods and periods of accounting, while the subject of depletion has been separated into four parts, viz.: depletion in general, of mines, oil and gas wells, and timber.—A. E. H.

INCOME TAX PROCEDURE, 1282 p. EXCESS TAX PROCEDURE, 351 p., by Robert H. Montgomery, of the New York Bar, Certified Public Accountant, ex-President, American Association of Public Accountants, Professor of Accounting, Columbia University—The Ronald Press Company. New York, 1920.

Mr. Montgomery, in addition to his many titles above mentioned, is a valued and helpful member of the National Tax Association and, as in the case of Mr. Holmes, we are pleased to make such mention of his volumes as will at least give our members knowledge of their publication, doubtless all that is needed, as the previous editions have proven their great value in solving the perplexities of the subjects covered.

The work appears in two volumes, bound in limp cover, printed on thin but durable paper, and is convenient and comfortable in handling. The vigorous, definite and authoritative approach to the subjects makes the books peculiarly helpful to the business man, while the discussions of doubtful points will be found of great assistance to the special student and investigator as well as the lawyer called upon to advise upon the more difficult points.

Detailed description of the volumes is unnecessary as the earlier editions, issued in 1917, 1918 and 1919 are well known. It should be said, though, that this edition represents an entire revision with much elaboration and the addition of much new matter. The method follows that of the previous editions, the text of the law being given under the different heads with the regulations and rulings and the author's comment and criticism, and here we continually find practical suggestions of the greatest help in handling troublesome questions. For instance, in the matter of computing exempt interest on federal securities, the author reproduces a special blank with instructions for filling it out which seems to offer considerable assistance on that most troublesome subject.

As before, the author does not hesitate to challenge the interpretations of the Treasury Department when he considers them incorrect and supports his text by well-directed argument and illustration, here also giving the taxpayer practical advice to govern his action and to protect his rights.

The acknowledged authority of Mr. Montgomery on all questions of accounting practice and procedure makes his observations of unusual importance in the actual preparation of a return, which for most people is no small burden. It will be comforting to those unfamiliar with the technicalities of accounting to be put in possession of the experienced advice of a master of the subject.

The capital stock tax is thoroughly covered and it will be of particular interest to residents of those states where state income tax laws are effective, to find a full discussion of the New York income tax, both that on corporations and the personal income tax, with the official regulations and references to the differences in statute and ruling which obtain between the two laws.

The smaller volume, devoted to the Excess Profits Tax, is practically an essential to all who are confronted with the necessity of compliance with that complicated statute. That is, one must have everything there is, and then some more, but as the questions involved are largely of an accounting nature, the help afforded by the suggestions of such an authority should be eagerly sought.

While the books, as above suggested, rather emphasize the technical and the practical aspects, there is frequent reference to the decided cases with a discussion of their bearing upon the text and a table of cases alphabetically arranged.

After all, the average busy lawyer or adviser is most frequently called upon to hurriedly find an answer to questions on some particular section of the law or some ruling, and for these persons the index and other reference guides are most important. Here these books are especially well equipped. In addition to tables of contents and detailed classified indices, they contain as a unique feature, a special law index preceding the regular index. This enables one interested in a specific section of the law to turn to all the pages of the book where such section is discussed.—A. E. H.

VOLUME TWELVE OF THE PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION

The Proceedings of the 12th annual conference of the National Tax Association held at Chicago in June, 1919, has just been issued and copies of the volume are being distributed to members of the Association. The papers and discussions of the conference are fully reported in this volume of some 550 pages. The material has been carefully arranged and indexed. The scope of the work of the conference may be seen from the following summary of the contents of the Proceedings:

Tax Problems in the Middle Western States

The situation in Illinois was discussed by W. T. Abbott, vice-president of the Central Trust Company of Illinois, and by Douglas Sutherland of the Civic Federation. Recent legislation in Missouri was presented by Professor Isidor Loeb of the University of Missouri, and the problems of Indiana by Professor John B. Phillips of the University of Indiana. The remedies already applied in Montana were described by John Edgerton, Executive Secretary of the State Board of Equalization.

Taxation of Intangibles

Considerable time was devoted to the discussion of taxes on intangible property. Professor Fairchild of Yale spoke on registration taxes with special reference to the Connecticut Chose-in-Action law. Investment taxation in New York was discussed by deputy state comptroller James A. Wendell. Mr. H. H. Steele explained the moneys and credits law of North Dakota; and the taxation of intangibles in Minnesota, Maryland, and Kentucky was presented by J. G. Armson, Oscar Leser and Peyton N. Clarke, respectively.

Income Taxation

Daniel C. Roper, U. S. Commissioner of Internal Revenue, described some of the difficulties in the assessment and administration of federal taxation laws. Professor Adams of Yale, Chairman of the Advisory Tax Board of the Internal Revenue Department, spoke at length on the readjustments necessary to meet present and future conditions. A report of the Committee on Federal Taxation was read, covering income and excess profits taxation with recommendations for change and simplification in the existing laws.

State income taxation with special reference to the New York income tax law was discussed by Laurence Tanzer and Henry M. Powell.

Model Tax Committee Report

The committee which has been working on a model tax system presented the results of its labors and invited general discussion. Professor Adams, who, through pressure of work in Washington, was un-

role to work on the committee, pronounced it one of the wisest and most helpful statements ever published concerning the proper structure of the tax system of the American state.

Miscellaneous Subjects

Besides the papers above mentioned, the following may be noted:

Taxation of Banks
Milton W. Harrison, Director, New York Savings Banks Ass'n

The Codification of the Tax Laws of Iowa
Professor J. E. Brindley, Iowa State College

Some Constitutional Aspects of Taxation
Frederick N. Judson, St. Louis

State Taxation of Railroads under Government Ownership or Operation
James M. Gray, author of "Limitations of Taxing Power and Public Indebtedness"

State Excises on Foreign Corporations
Professor Thomas Reed Powell, Columbia University Law School

Inheritance Taxes
John S. Chambers, state comptroller of California

Preliminary report of the Committee on Mine Taxation

The Evils of Tax Exemption as Applied to Securities
Kingman Nott Robins, Rochester, N. Y.

State Officials Exempt from Federal Income Tax under Doubtful Authority
B. S. Orcutt, Wall Street Journal

State Legislation and Constitutional Amendments in 1918
C. C. Williamson, New York Public Library

The Work and Influence of the National Tax Association
Lessing Rosenthal, Chicago

The Tax Program of the Non-Partisan League in North Dakota
H. H. Steele, Bismarck

The secretary of the Association reported that this was the largest conference yet held, that 42 states and 2 Canadian provinces were represented.

One of the chief features of these volumes of Proceedings is the discussion, in which individual problems are brought out and members of the conference given opportunity to exchange experiences. In this way a common ground is reached and a great deal of valuable data is reported which otherwise might never come to light.

The volume may be procured through membership in the Association in connection with annual dues of $5, which also includes subscription to the monthly BULLETIN, and may be purchased separately, price $3.

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INCOME TAX COMPLICATIONS

The termination of the stock dividend controversy by the decision of the Supreme Court has opened up the old question of how to equalize taxes on incomes when derived through different forms of activity. This question which arose at the outset, was left unsettled and now again emerges, emphasized by the decision in question. It is hardly possible to say that this decision has really *settled* anything, for, as Professor Perry used to say to his students, of which the writer was one, "Nothing settled, 'til settled right." The unequal application of the income tax, if permitted to fall upon corporate profits only when distributed, when regard is had to the varying situations of the shareholders as respects time of acquisition of the stock, length of holding, variation in the income tax rates, etc., make it obvious that some attempt must be made to reach a solution of the difficulty.

One phase—perhaps the main issue—is discussed by Professor Powell in this issue. His keen analysis of the *Macomber* case and his discussion of its relation to the *Hubbard* case are important and his suggestion that it is by no means certain that the decision in the former destroys the existing method of taxing personal service corporations is, to say the least, persuasive.

Again in state income taxation, the decision in the New York case, digested in our last issue, brings sharply to the front the difficulties in taxing the non-resident or at least in securing a uniform and equal collection of such a tax.

As noted elsewhere, a lower court in Alabama has held the Alabama income tax invalid under the constitution of that state upon the ground that it is a property tax and is also discriminatory.

The rather fundamental changes in the North Dakota income tax law, made by the recent legislature, and the repeal by the legislature of New Mexico of the income tax law of that state, such repeal having been vetoed by the governor, indicate the unsettled conditions which now obtain.

It seems evident that there is much work to be done in adjusting these income tax questions. The chaos of the general property tax from which we were to be delivered and the growing dissatisfaction with the inheritance tax situation, would make it seem desirable that definite effort be made to prevent the disastrous results

which will follow the adoption of income taxation unless some sort of interstate agreements are made, looking towards co-operation in the enactment of such tax laws. This Association ought to take an active part in furthering such a program.

An example of what may be accomplished is furnished by the plan and scope of the recent New York state tax conference, described elsewhere herein. It was the uniform consensus of opinion of those present, that the discussion of questions which were of such vital interest to the people of the states represented, participated in by the qualified and responsible officials of those states, was of very great mutual advantage and interest. The opportunity thus given, through direct acquaintance and contact, to understand conditions obtaining in the different states, as a basis for cooperative action, was a distinct gain for the cause of interstate comity in taxation.

It is to be hoped that at the 1920 national conference this particular subject may be recognized as one which should receive careful attention and action on the part of the Association.

A NOTABLE STATE TAX CONFERENCE

The ninth annual New York conference on taxation was held at Utica, March 18 and 19, under the joint auspices of the New York State Tax Association and the State Tax Commission. This conference had two definite purposes: first, to emphasize the local problems, through discussion by local officials, and second, to inaugurate an interchange of ideas between representatives of New York and neighboring states, the need for this being emphasized by the adoption of the state income tax in New York and Massachusetts and its serious consideration in New Jersey and Connecticut. Both of these purposes were well advanced. The papers and addresses were generally deemed of an unusually high class. The attendance was large and the interest well sustained.

The scope of the sessions on local problems may be indicated by reference to the topics discussed, as follows: Equalization; Full Value Assessment; Consolidation of Levies; Cooperation and Standardization in Local Assessments, and Assessment of Tangible Personalty.

That the second purpose above referred to was substantially accomplished may be assumed from the presence of such well-known and well-qualified speakers as Messrs. Shaw and Lyon of Massachusetts, State Tax Commissioner Blodgett, Judge Cramer and Professor Fairchild of Connecticut, Speaker A. N. Pierson of New Jersey and A. C. Girdwood of Maryland. The discussion was opened by State Income Tax Deputy Mark Graves, who gave a highly instructive account of the New York law, made particularly enlightening as Mr. Graves was fresh from the campaign of administration which had then just closed. General discussion of this subject followed, participated in by the representatives from other states above named and by others in attendance, the resulting effect being admittedly of material value to the solution of the problems presented.

Similarly with the corporation taxes, the New York law was explained by Tax Commissioner Merrill and the conference had the advantage of discussion by Mr. Lyon, Director of corporation taxes of Massachusetts, who explained points arising with respect to the law of that state.

Other addresses included A summary of tax legislation of 1919 by Charles J. Tobin; The Problem of Local Expenditures, by W. P. Capes; The Sources of Public Revenue by Kingman Nott Robins; The High Cost of Government and How to Meet It, by Prof. Carl C. Plehn; Constitutional and Statutory Changes, by L. A. Tanzer; Inheritance Taxes, by Charles W. Gerstenberg; Public Utilities, by C. E. Reeves.

Resolutions were adopted, following the trend of the discussion, favoring the elimination of the exemption feature in state and municipal securities hereafter issued; strongly protesting against the proposal now pending in the legislature and which has been pressed by the real estate interests, for exemption of interest on mortgages from income tax; providing a committee to consider the adoption of a uniform assessment date; urging the elimination of special local tax legislation.

A chief feature was the general discussion of economic conditions and the fiscal situation likely to exist during the near future, by Professor Plehn, who happens to be in the East as exchange professor at Columbia and who very kindly consented to participate.

NOTES AND NEWS ITEMS

On March 20, Judge Miller of the circuit court, in litigation pending before him, held that the **Alabama** income tax law was unconstitutional; that being a property tax the rate exceeded the constitutional limit of 65c. per $100; that it was further objectionable because of discriminating features. The case is to be heard on appeal to the Supreme Court in April; meanwhile the Tax Commission is advising that returns be filed before April 15, the date fixed in the law, in order to prevent penalties in case the law is upheld in the supreme court.

We have not heretofore made mention of the important movement for administrative efficiency accomplished at the last legislative session in **Idaho** by the adoption of the Administration Consolidation bill. This bill presents a reorganization of forty state governmental agencies, which are consolidated into nine single-headed departments, comprising twenty officers. Twenty-seven of the agencies were boards; the thirteen officers had assistants and deputies, and nearly every agency had a secretary, so that a large number of individual officials were abolished by the adoption of this bill.

The Department of Finance is entrusted with the installation of a uniform system of bookkeeping and financial reports for the several departments; supervision of securities and depositories; preparation of state budget; administration of laws relating to assessment, levy, collection and distribution of taxes; and investigation of efficiency of administration of departments.

Tax Commissioner Howe advises that no tax laws were enacted at the special session of the **Kansas** legislature which effected any change in the system. Some statutes were passed, authorizing increases in tax levies, mostly for school purposes, but nothing was enacted of a general character.

Secretary Peyton N. Clarke of the **Kentucky** Tax Reform Association advises that the following measures were adopted by the recent legislature and that it is considered that they will receive the approval of the Governor:

The state tax on poultry is reduced to 10 cents on each $100, the same as live stock.

The limit of taxation for school purposes in cities of the first class is increased to $1.00.

The local taxes on unmanufactured agricultural products is limited to 15 cents for counties and the same amount for towns.

The limit for graded schools is increased to 50 cents.

Methods of equalizing re-assessments ordered by the State Tax Commission and appeals from the same are provided.

The county tax commissioners are required to view property and call on taxpayers before assessment.

Warehouses are required to report property on storage and names of owners.

The appropriation for expenses of the State Tax Commission is increased from $50,000 to $80,000.

The tax on whiskey is fixed at 50 cents per gallon and that on gasoline at 1 cent per gallon.

Licenses on various corporations are provided and the license on race tracks fixed at $2500 per day.

No laws were enacted affecting the present classification system.

The budget system of appropriations provided for at the session of 1918 was put in operation.

Secretary Burtless of the **Michigan** commission writes:

"I enclose a table showing a comparison of the assessed valuation and taxes levied in this state for the years 1908, 1909, 1918 and 1919.

"There is in this table a great deal of food for thought. The extravagant tendencies of modern times are certainly reflected in the tax levy, and these tendencies must soon be curbed or else we must discover new subjects for taxation. Real estate cannot much longer stand the constant increase in taxes, and it seems to me this table presents a very good argument for the adoption of the model tax system recommended by the National Tax Association."

ASSESSED VALUATION AND TAXES LEVIED IN THE STATE OF MICHIGAN

	1908	1909	1918	1919
Real Estate	$1,283,137,283	$1,315,627,624	$3,325,943,828	$3,515,143,380
Personal	365,534,128	371,528,073	892,837,850	988,837,601
Total	$1,648,671,411	$1,687,155,697	$4,218,781,678	$4,503,980,981

	1908	1909	1918	1919
State Tax	$4,194,333	$5,929,304	$9,109,652	$17,432,614
County Tax	3,732,790	4,499,690	10,142,418	11,684,986
Township Tax	1,071,429	1,150,268	2,001,632	2,101,786
School Tax	5,886,264	7,186,799	24,232,110	29,753,423
Highway Tax	2,916,817	3,014,344	6,226,436	8,658,775
County Road Tax	529,452	741,868	3,003,111	5,124,191
Drain Tax	270,295	267,628	752,242	860,758
City Tax	9,890,332	10,791,845	26,420,641	31,587,226
Village Tax	1,188,220	1,291,173	3,172,579	3,557,909
Rejected Tax	9,396	6,170	71,831	14,436
Total Taxes	$29,689,328	$34,879,089	$85,132,652	$110,776,104
Average Rate	$18.01	$20.67	$20.18	$24.60

The constitutional convention of **Nebraska** has acted at least tentatively upon the taxation sections of the proposed new constitution. The committee on revenue and taxation has reported the following two sections to replace similar sections in the present constitution:

"Sec. 1. The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes other than property taxes may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature.

"Sec. 2. The property of the state and its governmental subdivisions shall be exempt from taxation. The legislature by general law may exempt property owned and used exclusively for educational, religious, charitable or cemetery purposes, when not owned or used for financial gain or profit to either the owner or user, and property owned and used exclusively by agricultural or horticultural societies when not owned or used for financial gain or profit to either the owner or user. Household goods to the value of $200 to each family shall be exempt from taxation. The legislature by general law may provide that the increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land. No property shall be exempt from taxation except as provided in this section."

The effect of Section 1 is to continue the uniform rule and the ad valorem method as to real estate, tangible property and franchises and to permit other treatment of intangibles, either a classified property tax or an income tax. The change in Section 2 is the exemption of household goods.

We are further advised that the convention is expected to report a proposal for a Tax Commissioner. Thus Nebraska seems about to be freed from the "uniform rule" and to take a pronounced step towards effective administration of her tax laws. Already under existing laws, through the newly constituted Department of Finance, much progress has been made towards uniformity and equalization among the counties.

Director Asplund of the **New Mexico** Taxpayers Association advises as follows:

"A special session of the Fourth Legislature of New Mexico was held during the week February 16-20. The only subject referring to taxation included in the Governor's call was that of a consideration of the state income tax law enacted at the regular session in 1919. A new law for taxing incomes was proposed but failed of passage. Instead, the present law was repealed, but the repeal was vetoed by the Governor, who felt that the law should stand, in order that the validity of its provisions should be tested in the courts. The legislature made a step forward in providing for a special tax commission to study the desirability and practicability of a sound income tax law in its relation to the whole revenue system. In fact, it is intended that this commission shall formulate and report to the next legislature in 1921 a comprehensive correlated system of taxation. This commission has been appointed by the Governor and will spend the next nine months in an effort to devise such a system."

Tax Commissioner Lovell of **Oregon** advises that the special session which convened January 12th and adjourned January 17th, enacted no laws affecting tax matters except a law permitting assessors and their deputies to administer oaths authorized by law to be taken or made relating to the assessment and taxation of property. There had been such a law but it was repealed several years before, though not generally known until the Supreme Court decided a case last year involving that repeal.

We had not noted until recently that the legislature of **Porto Rico** enacted a general income tax law in 1919, following largely the federal act. This was accomplished by Act No. 80, Laws 1919, approved June 26, 1919, which repeals the Acts of Congress of September 8, 1916 and October 8, 1917, and by Section 1 of Act No. 8 of Porto Rico approved December 12, 1918.

From Chairman Jones of the **South Carolina** commission we have the following:

"Answering your inquiry, we beg to advise that no tax legislation was enacted at the last session of the General Assembly which adjourned last week. We may state, however, that we recommended the passage of several tax laws, including an inheritance tax law, the imposition of an occupation tax, and a proper assessment of securities. A commission was appointed by the Legislature to study the problems of taxation during the present year and to make a report to the General Assembly at its next session. We hope very much that the commission will be able to make some strong recommendations at the next session which will no doubt be adopted."

Chairman Eveland of the **South Dakota** Tax Commission writes as follows:

"The eighth annual conference of County Auditors with the State Tax Commission was held at Pierre, March 4th and 5th. Many papers of interest were read. The application of provisions of law for exemption of dwelling houses occupied by the owner was a subject covered by H. L. Eveland, chairman of the State Tax Commission. Hugh Smith, a member of the Tax Commission, explained the provisions for exemption on various classes of personal property. The exemption of dwelling houses occupied by the owner as his home and an exemption on agricultural implements and tools of a mechanic are new laws in South Dakota and the results of the operation of these laws are being awaited with much interest.

"A. C. Bernau read a paper on poll taxes, dealing briefly with the experience of other states in handling this proposition, which was followed by a lively discussion by those present.

"A very interesting paper was read on the subject of the assessment of money and credits containing suggestions for improvement in the administration of the new law which provides for a separate listing of this class of property so that it will be subject to a levy of 3 mills on the dollar instead of the regular ad valorem levy to which all other personal property is subject. South Dakota operated last year for the first time under this new money and credits law, with the result that $110,000,000 were listed for taxation as against $16,000,000 in 1918 under the provision for listing it with other personal property. In 1918, 9,574 persons were assessed for

money and credits, the average assessed valuation being $1,661.74. In 1919, 68. 593 persons were assessed for money and credits, the average being $1,616.74.

"In addition to the tax on money and credits in 1919, a tax of approximately $500,000 was collected on mortgages presented for record under a mortgage registry tax law which became effective April 1st, 1919."

Upon the recommendation of its taxation committee, of which Fayette R. Plumb is chairman and Charles A. Andrews a member, both being members of the National Tax Association, the National Industrial Conference Board has addressed the following letter to members of Congress:

"TO THE HONORABLE MEMBERS OF THE UNITED STATES SENATE, AND THE HOUSE OF REPRESENTATIVES,

Sirs:

The National Industrial Conference Board, a federation of twenty-six of the most important national and state industrial associations in the various branches of American industry, comprising a total membership of over fifty thousand manufacturers who in normal times employ over seven million men and women, begs to submit for your earnest consideration the following Resolution, adopted at the Board's regular meeting on February 19th, 1920:

RESOLVED, That the National Industrial Conference Board earnestly recommends and urges that provision be made forthwith for the creation and appointment by Congress of a federal commission composed of authorities in the field of taxation, including at least one official of the United States Treasury Department, but a majority of whom are not in the service of the United States, to examine the present internal revenue laws of the United States, relating to income, profits, and miscellaneous taxes, with a view to repealing or amending said taxes or substituting any other form or method of taxation for any of said taxes; and that said commission be directed to report to the Congress of the United States its conclusions and recommendations, including drafts of any bills, as soon as may be, but in no case later than one year from the appointment of the Commission.

Trusting that the request of the National Industrial Conference Board will be given the attention which the importance of the subject matter covered by the Resolution would warrant, I beg to remain

Respectfully yours,

M. W. ALEXANDER,

Managing Director."

From Judge Fellows we have the following account of the recent Constitutional Convention of **New Hampshire,** the tenth convention held by the people of the state of New Hampshire during the 145 years since the adoption of the first state constitution in 1775, which finally adjourned January 29, 1920:

The convention assembled June 5, 1918, organized and elected as president Hon. Albert O. Brown, chairman of the state tax commission, and, without transacting any affirmative business, two days later adjourned subject to the call of a committee whenever in their opinion the public good required it, and in any event within one year after the conclusion of the war and the establishment of peace.

In compliance with a call issued by the committee the convention reassembled January 13, 1920, and finally adjourned after a session lasting sixteen days.

At the June, 1918 session twenty resolutions proposing amendments to the constitution were offered and but one was discussed, that relating to the taxation of growing wood and timber.

The resolution was as follows: "Provided, further, the said General Court shall have full power and authority to specially assess, rate and tax growing wood and timber without regard to the rule of proportion otherwise required in taxation."

The subject matter of this resolution was vigorously debated during two days and by a vote of 122 to 159 the resolution failed of adoption.

Fifteen additional resolutions were presented at the January session of the convention, making thirty-five in all for both sessions, but as many of them related to the same subject, it may be said that but seventeen separate propositions were considered.

Proposals looking to the initiative and referendum, amendment of the constitution through legislative action, and abolishment of the governor's council were politely treated and promptly dismissed.

One enterprising member secured a hearing before a committee on a resolution which would permit towns to practically purchase a few insolvent street railways now operating in the state. An adverse report of the committee on this resolution was adopted by the convention, and a like fate befell a resolution which provided that the name of a person in office should appear on the ballot for the election of a suc-

cessor at the termination of the term of office.

The measures which aroused chief interest related to taxation and representation in the house of representatives.

The "wood and timber" resolution appeared in January in a slightly modified but more appealing form and was argued at length and with ability on both sides. It failed of adoption on a division by a vote of 95 to 137; a motion was made to reconsider the latter vote and notice was given that the motion would be acted on in the following week on a day when all the members might be in the hall. This gave the members an opportunity to spend the week end at home and further consult with their constituents. When the vote was taken 93 members voted in favor of reconsideration and 223 members against, thus for the third time defeating the resolution and pretty effectively putting an end to the claim that there is any widespread demand throughout the state for any method of taxation of wood and timber other than at full value.

The owners of large tracts of woodland did not appear before the convention to advocate the adoption of the resolution, and the master of the state grange did appear and, speaking for the farmers, very emphatically opposed its adoption.

A resolution was introduced which would strike out of the constitution the word "proportional" and add the following clause, "the public charges of government or any part thereof may be raised by taxation. The subjects of taxation may be divided according to their kind or value into classes differently taxed."

Every reader of the BULLETIN understands the purport of that resolution. It was rejected by a large majority. In fact, very little sentiment was manifested in favor of opening wide the door, as it was termed, for the legislature to do as it might see fit in matters of taxation.

The important feature of the convention and the accomplishment of the purpose for which it was called was the adoption, without opposition, of the following two resolutions:

First, "Provided, further, the said General Court shall have full power and authority to impose and levy taxes on incomes from whatever source derived, which taxes may be classified, graduated and progressive, with reasonable exemptions."

Second, "Taxes on property when passing by will or inheritance may be classified, graduated and progressive and with reasonable exemptions."

The second resolution was offered to solve any possible doubt as to the constitutionality of the present inheritance tax statute under the constitution as it now reads.

If the income tax resolution shall be ratified by the people, the legislature will be able to settle the vexing question of the taxation of intangibles by taxing income and exempting principal. In other words, there will remain no constitutional hindrance to the legislature enacting in full the Model System of State and Local Taxation recommended to the National Tax Association by Professor Bullock's committee.

Seven proposed changes to the constitution in all will be submitted to the people for action at the biennial election next November, including the two last above mentioned.

One provides for a reduction of the house of representatives to not exceeding three hundred and twenty-five members; one gives the governor authority to veto any item or items in an appropriation bill; one removes the present limitation of time for which pensions may be granted; one strikes out the words "evangelical" and "protestant" where they appear in the bill of rights; and the final resolution repeals the article in the bill of rights which reads, "no person who is conscientiously scrupulous about the lawfulness of bearing arms shall be compelled thereto, provided he will pay an equivalent."

No "conscientious objector" has ever been discovered in the state but the article does not look well in print.

The convention was conservative, did all that it ought to, and wisely refrained from doing many things that it ought not to have done.

The **New York** legislature, now in session, is concerning itself with many tax measures, some of which have been suggested as the result of the experience in the administration of the new income tax law. Four measures have already become laws.

Chapter 58 repeals subdivision 3 of section 362, thus removing the limitation in the original law upon the amount of the exemption of federal officials.

Chapter 60 provides for disclosure of returns to officials of the federal income tax service, provided similar provision is made for inspection of federal returns by state officials.

Chapter 113 amends section 219 of the law imposing a franchise tax on the net income of corporations by making certain their exemption from the personal property tax.

Chapter 120 amends section 352 of the income tax law definitely removing all intangible property from ad valorem taxation.

Amendments, extending the exemptions to non-residents, required by the decision of the Supreme Court in the *Yale & Towne* case; rearranging the provisions as to withholding agents; granting more definite credit to non-residents for taxes paid in their home states; increasing the powers of the comptroller; clarifying the provisions as to estates and trusts are in process of completion by the committees.

The much-abused 5% penalty inheritance tax seems likely to be repealed and bills are being perfected to repeal the limitation on interest deduction contained in subdivision 2 of section 360 and to provide for gain or loss to be denoted in case of the disposition of property by gift.

A bill, evidently scheduled for passage, provides for the taxation of freight car companies and another bill proposed would permit or require the use of consolidated returns by affiliated companies.

The anti-rent profiteering agitation has resulted in a series of laws designed to curb the practices of some landlords, but up to this writing the campaign of the real-estate owners to secure exemption from income tax of mortgage interest has been unsuccessful. A bill has been introduced to subject interest on future issues of state and municipal securities to the income tax.

It must be said to the credit of the officials responsible, that the administration of the income tax, which many looked forward to with misgivings and with doubt as to the results, has been accomplished in a remarkably efficient manner and with the minimum amount of confusion and dissatisfaction. The attempt to apply a state income tax to the complex situation in New York was a stupendous undertaking and one which seemed likely to cause an administrative strain of serious moment.

The result reflects great credit upon the State Comptroller and the group of officials directly in charge of the law headed by Income Tax Director Mark Graves, a member of this Association, from whom we learn that the yield of the tax in its first year will run somewhere around thirty millions.

Lyman A. Baker, Secretary to the Tax Commissioner of **North Dakota,** in giving an account of recent legislation in that state, mentions a decision of the supreme court rendered March 23, 1920, holding that negotiable instruments of a non-resident were not taxable as provided by the Act passed at the regular session of 1919. Prior to this decision the special session had re-enacted the law, so that it does not now apply to the intangible property of non-residents.

The special session exempted moneys and credits from taxation, as the income tax law was deemed a sufficient tax on such property. The income tax law was amended in several particulars. The elaborate withholding provisions were repealed, being deemed to involve too much administrative difficulty and instead, more complete returns of information are required.

A license tax was imposed on ferries and motor vehicles and a gross earnings tax on freight-line and car-equipment companies.

The oil tax law was amended; semi-annual payment of real estate taxes was provided and a tax supervisor for each judicial district authorized.

Mr. Baker mentions the efficiency of the oil tax law which produces a large amount of revenue and is easily administered. The capital stock tax law is being contested on constitutional grounds by the railway companies. It is based upon outstanding stock and bonds and the claim is that it in effect attempts to impose a tax on bond issues. Objection is also urged to the mileage basis of apportionment as unfair. The yield of this tax is small, amounting to approximately $80,000.

It is thought that the income tax will yield in the neighborhood of $1,000,000.

THE STOCK-DIVIDEND DECISION AND THE CORPORATE NONENTITY

DOES EISNER V. MACOMBER INVALIDATE THE TAX ON STOCKHOLDERS OF PERSONAL-SERVICE CORPORATIONS?

THOMAS REED POWELL

By a vote of five to four, the Supreme Court decided in *Eisner* v. *Macomber*[1] that a *bona fide* stock dividend is not "income" within the meaning of that term in the Sixteenth Amendment.[2] For the majority, Mr. Justice Pitney said that a stock dividend gives a stockholder none of the assets of the corporation but only a new form of the evidence of his prior interest therein. There were two minority opinions. Mr. Justice Holmes, for himself and Mr. Justice Day, observed:

"The known purpose of this amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest."

Mr. Justice Brandeis was more elaborate. The substance of his dissent, in which Mr. Justice Clarke joined, was that stock dividends are so much like other things already held to be income that they should be put in the same class. He also referred to the duty of the court to give great weight to the judgment of Congress.

The debate between Mr. Justice Pitney and Mr. Justice Brandeis will be reported more in full in a later issue. The present effort is confined to one round of the contest and its bearing on another constitutional issue that may soon ask to be settled. It has been suggested that Mr. Justice Pitney sounds the death-knell of the present way of taxing the income of so-called personal-service corporations, by disregarding the corporation and treating its income as that of the stockholders irrespective of any distribution to them. The idea finds warrant in several parts of the learned Justice's opinion. Here is a sample:

"We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder."

Such an affirmation, considered apart from the issue to which it was directed, might seem to show that the Supreme Court is persuaded that Congress in taxing incomes must respect to the full the so-called separate individuality of the stockholder and the corporation of which he is a member. This would mean that stockholders of personal-service corporations may not be taxed on their proportionate interests in the undistributed income of the corporation.

Obviously, however, it is unseemly to abstract words from their context, dissociate them from their function in the situation with which they deal, and convert them into proclamations of universal and unqualified principles. Such an impropriety leads only to confusion, especially when a single judicial opinion has utterances which point in diametrically opposite directions. An instance of this appears in the very paragraph from which we have quoted. For Mr. Justice Pitney begins by saying:

"We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment."

Here is ample verbal authority for the conclusion that Congress may, as it does, regard a personal-service corporation as a mere form through which individuals act. Mr. Justice Pitney, therefore, does not bar further inquiry as to the constitutionality of assessing stockholders on the income of personal-service corporations.

This inquiry may conveniently start with *Collector* v. *Hubbard*,[3] decided in 1871.

[1] United States Supreme Court, No. 318.—October Term, 1919 (March 8, 1920), 40 Sup. Ct. 189.

[2] "The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

[3] 12 Wall. 1.

The issue in the case was the interpretation of that part of section 117 of the Act of June 30, 1864,[4] which reads:

". . . and the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits or income of any person entitled to the same, whether divided or otherwise."

Hubbard owned stock in two manufacturing corporations. He objected that his interest in undistributed corporate earnings was not legally subject to assessment under the statute. The court disagreed with him. It thereby allowed Congress to "pierce the veil of the corporate entity," and to treat the stockholders as partners, just as the present income tax law treats stockholders in personal-service corporations. Mr. Justice Clifford declared that "it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards."

In so far as this may be taken as a pronouncement on a constitutional issue, it decreed that a stockholder cannot object that he enjoys no taxable gain or profit when corporate gains or profits are assessed to him rather than to the corporation. But what is a gain or profit to the stockholder is not necessarily income received by him. If in 1871 the Supreme Court thought that a tax on gains or profits was an indirect tax, even if such gains and profits are capital rather than income, then *Collector* v. *Hubbard* may rest on grounds which will not directly support the present federal tax on stockholders of personal-service corporations. For *Pollock* v. *Farmers' Loan & Trust Co.*,[5] decided in 1895, settled that a tax on gains, profits or income issuing directly out of property is a direct tax. The Sixteenth Amendment, as authoritatively analyzed,[6] does not turn such a tax into an indirect tax. It merely lets Congress levy a direct tax on incomes without apportioning it among the states according to population. Any other direct tax than one on income must still be apportioned. To sustain the present tax on stockholders of personal-service corporations, corporate gains and profits must not only be taxable to the stockholder, but must also be part of his income.

Collector v. *Hubbard* was a bone of contention in *Eisner* v. *Macomber*. The Solicitor General adduced it as authority that a stock dividend is income. Messrs. Hughes and Murray, for Mrs. Macomber, answered very properly that the tax on stock dividends did not disregard the corporation and treat its income as that of the stockholder, as did the tax sustained in *Collector* v. *Hubbard*. Had it done so, it would have assessed stock dividends to the recipient only to the extent that they were the fruit of corporate income earned during the taxable year and after he had acquired his parent stock. It would also have refrained from taxing that income to the corporation. The tax on stock dividends did neither. Instead of disregarding the existence of the corporation, it was predicated thereon. Its theory was that there has been a transfer from the corporation to the stockholder, and that this transfer brought income to the stockholder, without regard to the prior situation. The constitutional issue raised by the stock-dividend tax was therefore one to which the principle of *Collector* v. *Hubbard* had no application.

Mr. Justice Pitney points this out when, in answer to the Government's contention that "the new certificates measure the extent to which the gains accumulated by the corporation have made him [the stockholder] the richer," he says:

"In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations the measure would not hold true."

This was enough to dispose of the Government's contention. Perhaps Mr. Justice Pitney would have stopped here and refrained from emphasizing the reality of the corporate entity, had not Mr. Justice Brandeis in his dissent tempted him to take a broader ground. The learned dissentient points out that "the law finds no difficulty in disregarding the corporate fiction whenever it is deemed necessary to attain a just result," and then tries to make this pertinent to the issue before him. He looks at the Act of Congress as one which,

[4] 13 Stat. 223, 282.

[5] 158 U. S. 601.

[6] *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 17-19; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 112 *et seq.*; *Peck & Co.* v. *Lowe*, 247 U. S. 165, 172-173.

instead of taxing the stockholder on his undivided share of the corporate earnings, taxes him on that share of those "earnings which is, in effect, distributed by means of the dividend paid." This approach still leaves the objection that the dividend may come from corporate earnings accumulated prior to the acquisition of an interest in the corporation by the recipient of the stock dividend.

Mr. Justice Brandeis' effort to escape from this obstacle seems lamentably lame. He says first:

"The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made, if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid or in the year preceding."

Next he notes that cash dividends are held taxable even though paid from assets possessed by the corporation prior to the effective date of the Sixteenth Amendment.[7] This rule, he recognizes, "if indiscriminately applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship and have raised serious question." But Congress, in the kindness of its heart, "endeavored . . . to guard against any serious hardship" by taxing only stock "dividends representing profits earned since March 1, 1913." It thereby gave stockholders "notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income."

This may do well enough to show that it would not be cruel to tax stock dividends which are the offspring of stock owned by the recipient on March 1, 1913. But the statute did not so limit its grasp. It did not inquire into the circumstances under which the purchaser acquired his parent stock. It would hit one who parted with his capital to buy stock at a price based on the accumulations soon to be capitalized by the issue of stock dividends. The hardship on such stockholders would not be ameliorated because others received a lighter blow. Neither the statute nor the regulations gave stockholders the opportunity to make the division which is essential to an application of a rule that what is income to the corporation may be regarded as income to the stockholder. And even such an opportunity would not make the law one "disregarding the corporate fiction," when that fiction was adhered to for the object of taxing the corporation on income as it accrued. On Mr. Justice Brandeis' analysis, Congress was with one hand preserving intact the veil of the corporate entity while with the other it was rending it to shreds. It relied on the reality of the corporation to tax it on its income and to call a stock dividend a transfer from the corporation to the stockholder; and then to dismiss doubts as to the reality of the transfer, it makes a myth of the corporation and thinks of its accumulating profits as accumulating income of the stockholder. The later dividend adds nothing; if the corporation is a phantom, the dividend is another.

Doubtless it was in anticipation of the possibility of such prestidigitation that the attorneys for Mrs. Macomber met the Government's contention with the broader answer that "undivided corporate profits are not income to the stockholder." To escape from *Collector* v. *Hubbard* they insisted that it "was dealing with the mere fact of the increment and did not deal with its nature." Mr. Justice Clifford's opinion lends countenance to this contention. After conceding that for certain purposes the stockholder has no title to corporate earnings prior to dividend declared, he proceeds:

"Grant all that; still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided.

"Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subjects of sale, gift or devise. . . . Congress possesses the power to lay and collect taxes, duties, imposts and excises, and it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards; and it is clear that Congress did direct that all such gains and profits, whether divided or otherwise, should be included in estimating the annual gains, profits or income liable to taxation under the provisions of that act. Annual gains and profits, whether divided or not, are property and, therefore, are taxable."

[7] *Lynch* v. *Hornby*, 247 U. S. 339.

This is loose language. Its probable meaning can best be guessed at by having in mind what bridge Mr. Justice Clifford had to cross. What he was seeking was a sufficient nexus between the stockholder and corporate gains or profits to make them taxable to him. This he found when he discovered that as an incident to his shares they were his property. In saying this, he very likely meant no more than that the lack of title to the corporate gains and profits was cured by the title to the shares whose value was enhanced by them. It would be rash to assume that Mr. Justice Clifford, in calling these corporate gains and profits the property of the stockholder, meant to imply that they were not his income. Cash dividends are property, but they are also income. The gains and profits taxed to the stockholder in *Collector* v. *Hubbard* were in the form of income received by the corporation during the taxable year in which the taxpayer owned his stock. Mr. Justice Clifford refers to them as the *annual* gains and profits of the corporation which might be included in estimating the *annual* "gains, profits or income" liable to taxation against the stockholder. This seems conclusively to negative the idea that he used "property" in the sense of capital. There is no hint in his opinion that a tax on the full value of the shares would be an indirect tax on capital invested in personalty.

The attorneys for Mrs. Macomber, however, imply somewhat vaguely that Mr. Justice Clifford had "capital" in mind when he said "property". This implication issues from their repeated statements that under the views then prevailing the only direct taxes were capitation taxes and taxes on land, and their deduction that by that criterion of direct and indirect taxes the decision was unassailable. But we can accept both premise and conclusion without drawing the inference that Mr. Justice Clifford intended to sustain the tax as one on capital. For our present purpose, however, the fact that counsel suggested this implication is more important than the firmness of its footing. For it helps us to understand Mr. Justice Pitney's comment on *Collector* v. *Hubbard* in his opinion in *Eisner* v. *Macomber*.

After quoting the relevant parts of Mr. Justice Clifford's opinion, Mr. Justice Pitney says:

"In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in *accumulated* earnings prior to dividend declared, it must be regarded as overruled by *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 627, 628, 637. Conceding *Collector* v. *Hubbard* was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not apportioned among the states, the Government nevertheless insists that the Sixteenth Amendment removed this obstacle, so that now the *Hubbard* case is authority for the power of Congress to levy a tax on the stockholder's share in the *accumulated* profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the Amendment applies to income only, and what is called the stockholder's share in *accumulated* profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in *accumulated* profits, nor in any particular part of the assets of the corporation, prior to dividend declared."

I have italicized the word "accumulated" in the four places in which Mr. Justice Pitney uses it, in order to emphasize the issue which he has in mind. He was answering the contention of the Government that accumulated assets of the corporation, no matter when acquired, were taxable to the stockholder as income even before any dividend, and therefore *a fortiori* after such accumulated assets were evidenced by a stock dividend. To maintain this, the Government adduced *Collector* v. *Hubbard*. But the actual decision in that case, even if unmodified, does not support such a position. It did not deal with corporate assets accumulated prior to the current tax period or prior to the time when the individual stockholder in question became a member of the corporation. It had before it, not *accumulated* corporate assets, but assets *accumulating* by way of corporate income from business during the year for which the tax was due.

The only possible comfort which the Government could extract from *Collector* v. *Hubbard* lay in the language of Mr. Justice Clifford's opinion. This language would serve nicely if it meant that a tax on any property interest of a stockholder in accumulated earnings of a corporation is a tax on income. For then, though the Pollock case made such an exaction a direct tax, the Sixteenth Amendment relieved it of the requirement of apportionment. But it was too apparent that neither Mr. Justice Clifford nor any one else ever thought that a tax on corporate stock, as personal

property, is a tax on income. So the Government was driven to another theory. It in effect adopted its opponent's inference from Mr. Justice Clifford's use of "property". This inference was that a tax on any property interest in corporate stock was an indirect tax, even though that interest was concededly a capital interest. Such a notion, if ever held, was banished from constitutional law by the Pollock case. As Mr. Justice Pitney puts it, the Pollock case overruled any conception of a power in Congress "to tax without apportionment a stockholder's interest in *accumulated* earnings prior to dividend declared." The Government concedes this, and then counters with the contention that the Sixteenth Amendment obliterates the Pollock case and therefore revives the Hubbard case and every possible inference from Mr. Justice Clifford's opinion.

But our present doctrine is different and has a different pedigree. The Pollock case settled that a tax on any property or income therefrom is a direct tax. It overruled the Hubbard case if that case sustained a tax on income from capital as well as if it sustained a tax on capital. According to the Supreme Court, taxes on capital or on income therefrom are still direct taxes. The effect of the Sixteenth Amendment is to permit the levy of such direct taxes without apportionment when, and only when, they are taxes on income. So the tax sustained in the Hubbard case is no longer immune from apportionment if it was a tax on capital.

The objection to a tax on capital might be concealed, but not overcome, by referring to "accumulated profits" without describing them further. Mr. Justice Pitney uncovered it and answered it by saying that "what is called the stockholder's share in *accumulated* profits of the company is capital, not income." It is reasonable to infer that here and elsewhere he means by "accumulated," accumulated. He is thinking, as the statute and attorneys for both sides required him to think, of profits *accumulated* by the corporation prior to the stockholder's membership therein and prior to the current tax period. He is not thinking, as he was not required to think, whether profits *accumulating* day by day in the form of income from corporate transactions may or may not be treated as *accumulating* in substance to the stockholder as taxable income of his and not taxable income of the corporation. He is not implying that the Pollock case affected the authority of the Hubbard case on such a question.

This question, which was not before Mr. Justice Pitney, is the question raised by the statute taxing stockholders on their proportionate interest in the income of personal-service corporations when that income is not taxed to the corporation. May Congress disregard the corporation as a legal entity distinct from the stockholders, and treat it as merely a form through which individuals run their affairs, like an agency or a partnership? *Collector* v. *Hubbard* is square authority that the stockholder cannot urge that he has no taxable interest in corporate income as it accrues to the corporation. On this point it is entirely unaffected by the Pollock case. That case said nothing whatever on the question whether the corporate entity might be disregarded. It held merely that, in testing whether a tax is direct or indirect, a tax on income must be considered the same as a tax on the source of that income, and that a tax on personal property or on the income therefrom is a direct tax.

It is by no means certain that the Pollock case would knock out the very tax sustained in *Collector* v. *Hubbard*. It would not have saved the corporation itself from an unapportioned tax on income from business operations as distinct from income from property, provided the statute was duly confined to such income. So it is likely that, even in the absence of the Sixteenth Amendment, a tax on corporate earnings from other sources than property would be held an indirect tax properly assessable to the stockholder rather than to the corporation. It would clearly be indirect if levied on the corporation. All that would prevent it from being indirect when levied on the stockholder instead of on the corporation would be the notion that as to the stockholder the gains were the fruit of his stock rather than of the corporate business. But if you can treat the corporation as only a form and identify the stockholders collectively with all corporate activities, your obliteration of the corporation necessarily carries with it an obliteration of the stock.

The same reasoning applies to the only contention that would exclude the tax on

stockholders of personal-service corporations from the dispensation of the Sixteenth Amendment that direct taxes on income need not be apportioned. Assume that a tax on the corporation would be a direct tax on income. Grant that *Collector* v. *Hubbard* deprives the stockholder of any objection that he has no taxable interest in the undivided corporate income. The only further objection is that a tax on that interest is not a tax on stockholder's income. It may be urged that what is income to the corporation is not necessarily income to the stockholder. The corporation has received in possession the wherewithal to pay the tax; the stockholder has received nothing. At first glance this objection seems formidable. It would be formidable, perhaps insurmountable, if the statute posited the existence of the corporation as a taxable person and also the separate existence of the stockholder as another taxable person. But the objection disappears if the corporate entity disappears. If you are allowed to look through form to substance, provided you disregard the form entirely, then income formally to the corporation is income substantially to the stockholder.

No new difficulty is created by the fact that the stockholder does not get physical possession of the income. The corporation is his designated agent for receiving his income for him. He may have entered into an arrangement which deprives him of full freedom of control over that income. So he may when partnership articles provide that a moiety of the annual profits shall be reserved for the use of the partnership business. He may contract with an agent that the agent may devote some of the principal's income to specified purposes, such as the payment of indebtedness. He may be a beneficiary of a trust and be taxed on income retained by the fiduciary. In all these cases he still has taxable income, though his hands are tied in advance so that he cannot lay hold of it. It is hard to see how the situation is any different as to corporate income, once it is established that a corporation may be treated like an agency or partnership.

Thus, instead of two questions, we have only one. Can Congress treat the corporation as non-existent? If it can, it follows that what is income to the corporation is income to the stockholder. *Collector* v. *Hubbard,* therefore, still stands as a precise precedent in favor of the present tax on stockholders of personal-service corporations. The only questions are whether it should be overruled, and whether Mr. Justice Pitney's opinion in the Stock Dividend Case indicates that the Supreme Court is inclined to overrule it.

On this latter question, the best that can be done is to match Mr. Justice Pitney's affirmations of the separate individualities of the corporation and its stockholders with expressions indicating that these affirmations had reference only to the issue before the court. After giving definitions of income, Mr. Justice Pitney inquires: "Can a stock dividend, considering its essential character, be brought within the definition?" He then proceeds:

> "To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attached."

The corporation in the case at bar was the Standard Oil Company of California. It was quite different from a corporation which owns little or no fixed assets, whose business is not the production and sale of physical commodities, whose activities are participated in by all of the stockholders and depend for success upon their individual abilities or reputations. The Standard Oil Company is no mere device by which individuals pool the income aspect of their personal, daily activities. It differs so fundamentally from a personal-service corporation that remarks about its nature and the stockholder's relation to it are in many respects inapplicable to personal-service corporations.

These substantial dissimilarities are of course accompanied by formal similarities. It can be said of both that "short of liquidation, or until dividend declared," the stockholder "has no right to withdraw any part of either capital or profits from the common enterprise"; that his interest is not that "of an owner, since the corporation has full title, legal and equitable, to the whole"; and that "if he desires to dissociate himself from the company he can do so only by disposing of his stock." But these formal aspects are not very important in personal-service corporations, where individuals merely unite in the sale

of their labor. And it would be almost wholly untrue to say of a personal-service corporation what Mr. Justice Pitney says of the kind of corporation he is considering, when he tells us:

"Often, especially in a growing business, only a part, sometimes a small part, of the year's profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities."

Mr. Justice Pitney certainly would not analyze a personal-service corporation as he analyzed the Standard Oil Company. Therefore his discussion should be regarded as having no reference to personal-service corporations.

The most striking statement as to the relations between a corporation and its stockholders follows a sentence, already quoted, which recognizes the power and duty of the court to look through the form of the corporation on proper occasions. Mr. Justice Pitney looks through and brings back this report:

"But, looking through the form, we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon the stockholders as partners when they are not such; treat them as having in equity a right to the partition of the corporate assets, when they have none; and indulge in the fiction that they have received a realized share of the profits of the company which in truth they have neither received nor realized."

Obviously the Supreme Court could not treat the stockholders of the Standard Oil Company as partners, when the tax on stock dividends treated them as stockholders. It could not treat the entire organization as unreal, when Congress taxed it. It could not disregard the difference between the corporation and the stockholder when Congress made that difference the basis of taxing an alleged transfer from one to the other. As Mr. Justice Pitney proceeds to point out, it is only by recognizing the separateness of the corporation and the stockholder "that any dividend—even one paid in money or property—can be regarded as income of the stockholder." His whole discussion bears on the taxability of a dividend. When such is the issue, of course the existence and separate individuality of the corporation are parts of the "essential truth". But we should not infer from any generality of Mr. Justice Pitney's language that he thought he had discerned not only the essential truth in the particular situation before him, but some universal essential truth.

The illegitimacy of such an inference is apparent from the concluding sentence of the paragraph from which we have been quoting. No advocate of the taxation of stockholders on income of personal-service corporations will fear the effect of this: "Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it." And note the words in italics in what follows:

". . . and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately *and additionally* taxed with respect to their several shares when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to the other."

By saying that the stockholders could not be "separately *and additionally* taxed," does not the learned justice have in mind the precise point that they may be taxed separately on corporate income if that tax is not in addition to one imposed on the corporation? Such a tax would not be one on the removal of money from one pocket to the other. It would treat the corporate treasury as the only pocket of the stockholder.

Here endeth the exegesis. It cannot claim conclusiveness. Some of it may be strained. But it has in its favor the presumption against isolating sentences from their setting. It is strongly supported by the unqualified recognition of the power and duty of a court to look through the form of the corporation to determine whether the stockholder has received income taxable without apportionment. It saves the opinion from the charge of *obiter dictum*. It is reinforced by common sense.

The final question is whether *Collector* v. *Hubbard* should be overruled. The only difference between the tax there applied and the one now in force is that the present surtaxes on individual incomes mount higher than the progressive rates of the Act of 1864. Such differences in rates do not ordinarily affect constitutional issues.

Yet the high surtaxes would be pretty rough on persons taxed on corporate income which they had no effective means of getting hold of. The possibility of such hardship was present in the tax on stock dividends. It was referred to by Mr. Justice Brandeis and confessedly influenced the majority. If Congress should treat stockholders generally as it treats stockholders of personal-service corporations, there might be question whether the threatened hardship should not be prevented by saying that the corporate entity could not be disregarded so as to impose oppressive burdens. Such a question is not likely to arise. It is too convenient for the most part to treat the corporation and its stockholders as separate one from another. Personal-service corporations stand in a special class. Even if *Collector* v. *Hubbard* should not be followed generally, it should still control the precise question under consideration.

A number of the differentiating characteristics of personal-service corporations have already been suggested. There is no reason why they should refrain from distributing all, or nearly all, of their earnings. Each individual member has continued control over his major contribution to the corporation and its activities, a control that must be quite as effective as his right to partition of partnership assets. What each contributes is not parted with in a lump, as in the case of the ordinary corporation. The contribution is mainly in the recurring day's work. If the corporation reserves any considerable part of the fruits of the labor of its members, it must usually be because all the members desire it. The mere fact that the states permit such anomalous corporations should not deprive the United States of the power to look through the form to the fact. If Congress disregards the form when it excludes such corporations from the excess-profits tax, it should be allowed to disregard the form to tax the stockholders as though they were partners.

No technical difficulties stand in the way of piercing the veil of the corporate entity. A court readily does it whenever it thinks it is a good thing to do. The technical objections are brushed aside by being brushed aside. In *Bank of California* v. *Richardson*,[8] decided in 1919, the Supreme Court disregarded the distinction between the property of a stockholder in his stock and that of the corporation in the assets which gave that stock value, and held that a stockholder in a national bank can deduct from the assessment of his stock that part of its value contributed by the stock of another national bank owned by the corporation of which he is a member. If the Supreme Court can so easily smash a form to hold a state tax unconstitutional, it can as easily smash a form to sustain the present federal tax on stockholders of personal-service corporations. It is hard to find any good reason why it should not do so.

[8] 248 U. S. 476. See also *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, in which it was held that a transfer which in form was a dividend by one corporation to another would not be regarded as within the intent of "income" as used by Congress, when the two corporations were in substance identical. Mr. Justice Pitney said: "While the two corporations were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control." It seems to be as an additional and independent ground that the court adduces the fact that the funds transferred according to the books were already in the possession of the parent corporation.

THE STOCK DIVIDEND DECISION

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In my opinion, there has seldom been a case before the Supreme Court in which the economic issues were so clear and simple. I do not wish to discuss the legal question, except to offer the passing suggestion that a decision which is so sound economically can hardly be bad law; or if so, so much the worse for the law.

The whole controversy over the taxation of stock dividends has turned upon the definition of the term "income". It is hardly necessary to point out that this un-

usual interest in the exact meaning of an economic concept would scarcely have arisen except for the constitutional restriction upon direct taxes imposed by the federal government. The rule that direct taxes, if laid at all, must be apportioned among the states according to their population requires a distribution of the burden so flagrantly unjust that Congress has never succeeded in raising any important revenue from direct taxation. Several attempts, beginning almost immediately after the adoption of the constitution and terminating at the time of the Civil War, have demonstrated the futility of direct taxation apportioned according to the constitutional rule. It is quite safe to say that so long as this rule prevails, the United States Government is precluded from the use of direct taxes in any form.

The definition of the term "direct tax" thus became important. It has been pretty well established that, in their use of the term, the framers of the constitution had in mind only capitation taxes and taxes upon land. This is a much narrower definition than that generally accepted by economists, but it was pretty closely adhered to by the Supreme Court in various cases brought before it until the famous decision of 1894 (*Pollock* v. *Farmers' Loan and Trust Co.*), which held that taxes on certain important forms of income were direct. Economists today generally regard the income tax as a direct tax, though few of them would accept the labored reasoning by which the Supreme Court in 1894 sought to bring its decision into harmony with the restricted idea of direct taxation as understood by the framers of the constitution, while reversing its own decision in the case of the Civil War income tax (*Springer* v. *United States*).

An income tax apportioned among the states on the basis of population would be such a grotesque travesty that the decision of 1894 practically forbade the taxation of incomes by the federal government. But the modern trend toward income taxation, in which America was lagging behind the rest of the world, was too strong to be withstood. The outcome was, not a new judicial definition of direct taxation, but a constitutional amendment giving Congress the power to tax "incomes, from whatever source derived," without the necessity of apportionment among the states according to population.

The Sixteenth Amendment transferred the battle-ground of terminology from the definition of "direct tax" to the definition of "income". The legal meaning of this term becomes of the utmost importance. For now Congress may impose, without regard to the rule of apportionment, taxes which would undoubtedly be declared direct, provided the object of such taxation be "income". Hence the great interest attached to the question: "Is the stock dividend income?"

In two previous issues of the BULLETIN [1] I have undertaken to set forth the economic character of the stock dividend. This statement of the economic principle involved has, I think, successfully withstood attack and received general acceptance.[2]

In the two cases (*Towne* v. *Eisner*, and *Eisner* v. *Macomber*) in which the Supreme Court has now passed upon the definition of the term "income", the decisions conform perfectly to the economic concept of income, as I have previously stated it. Justice Pitney's opinion is a masterpiece of clear reasoning upon matters of economic principle. Everyone interested in the subject ought to read his opinion from beginning to end. The crux of the whole matter lies in the unavoidable fact that a stock dividend takes nothing from the corporation and gives to the stockholder nothing that he did not already have. The balance sheet of the corporation shows absolutely no change on the asset side. On the liability side there is only the transfer of a certain amount from "surplus" to "capital" account, both accounts representing the equity of the stockholders, which equity cannot be either increased or decreased by such transfer. On the other hand, the cash dividend (or in fact a dividend paid in any property taken from the corporation's assets) takes something from the corporation and gives it to the stockholder. The stockholder in this case has received income from the corporation. In the case of the stock dividend he has received no *income*; the transaction has involved merely the *form* of his *capital*.

This analysis rests upon the fact that the corporation is an entity separate from

[1] April, 1918, p. 161; June, 1918, p. 243.

[2] In particular I am gratified to have Professor Seligman in a recent article adopt completely my statement of the case. (*American Economic Review*, Sept. 1919, p. 517.)

the shareholders, and nothing but confusion can come from failure to recognize the independent entity of the corporation. It is clearly recognized in the science of economics, and it is gratifying to find in Justice Pitney's opinion this clear statement of the matter from the legal side: "But looking through the form, we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property — can be regarded as income to the stockholder."

Between the individual engaged in business for himself and the corporation, we have various intermediate forms; such as the partnership, the joint-stock company, and the personal-service corporation. Though the economic characteristics of these several types of business organization are clear enough, it is not always easy to draw sharp lines of distinction between them. The law, for various purposes, requires that such lines be drawn, and they must necessarily be somewhat arbitrary. This offers no excuse, however, for seeking, as does Justice Brandeis in his dissenting opinion, to cloud the distinction between the corporation and its stockholders by means of the analogy of the partnership.

In general, I am unable to see that Justice Brandeis, in his long opinion, has set forth anything to weaken the argument of the majority opinion. He seeks to establish an identity between the stock dividend and the arrangement by which a corporation issues a cash dividend and at the same time gives its stockholders the right to subscribe pro rata for a new issue of stock to the amount of the cash dividend. Obviously these transactions are not identical and Justice Pitney disposes of the point with suitable brevity. Justice Brandeis is hardly convincing when he quotes as his authority the chance phrase of a newspaper reporter and then proceeds to beg the question in these words: "It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky, that is, issuing rights to take new stock pro rata and paying to each stockholder simultaneously a dividend in cash sufficient to enable him to pay for his pro rata of new stock to be purchased . . ."

Justice Brandeis also fails to make his point when he cites the various kinds of property in which a dividend may conceivably be paid. So far as the economic principle in question is concerned, all such cases resolve themselves into the simple question: Has something been taken from the corporation's assets and given to the stockholders? If so, the stockholder has received income; if not, he has not received income. The extreme case where a corporation pays a dividend in its own bonds, issued for the purpose, presents a real difficulty. In strict economic theory I should say that this is purely a capital transaction and that, while changing in part the relation between the stockholders and the corporation (making them now also bondholders), it does not involve any income to the stockholders. But the distinction between stockholders and bondholders is of less weight in economic theory than it is legally, and I can readily understand that the law may have to draw a sharp line between a dividend paid in bonds and the stock dividend. There is ample foundation for the legal distinction. In both cases, it is true, the total assets of the corporation have not been reduced, but the dividend paid in bonds reduces the *net* assets, which represent the stockholders' equity in the corporation, by the amount of the bond issue, which necessitated a corresponding reduction in the surplus. A share of stock in the corporation represents a less value than before, and while in this case the stockholders and bondholders are the same persons, it will not do to overlook the real difference between bonds and stocks. The stockholders, *as stockholders,* may be said to have received income from the corporation. Thus understood, the case presents no difficulty. On the other hand,

if we regard the dividend paid in bonds as only a capital transaction, it simply follows that the law has been unable to adhere in this particular to the economic notion of the fundamental similarity of stockholders and bondholders. In neither case is there anything to give more than superficial color to the claim that the stock dividend is income.

Perhaps what now most needs to be cleared up is the question: Does the decision permit large-scale tax evasion by the use of the stock dividend? The demagogic outcries of yellow journalism to the effect that the rich have now a way to evade taxes and that hereafter only the poor will bear the burdens of government scarcely deserve serious attention. But there does appear to be among thoughtful people some notion that the Supreme Court has opened a door through which certain favored ones may evade their share of taxation.

Now, it is obvious that there can be no evasion of the *income tax* by means of the stock dividend, once it is admitted that the stock dividend is not *income*. But there is a broader question, which troubles some. Is the principle of the income tax fairly and equitably carried out, if stock dividends may be declared and received free from tax? Is it not possible to escape one's fair share of taxation by the mere expedient of not declaring cash dividends (which would have to pay income tax), while distributing the accumulating surplus in the form of tax-free stock dividends.

There is a double confusion here. In the first place, it must be repeated that the stock dividend "distributes" nothing to the stockholder. It merely "capitalizes the surplus." He has more shares of stock, but they represent exactly the same equity in the corporation as before. He has received no income. And if the spirit of the income tax is to tax incomes, he has not evaded either the letter or the spirit of the law. Moreover, it should be clear that he would have "evaded" the tax just as successfully if no stock dividend had been declared and the surplus simply allowed to accumulate. He would be in exactly the same position in either case, and in neither case would he pay a tax. Still again, there are corporations where stock has no par value. In such cases there is no necessity of having a "surplus" account. Accumulations automatically increase the "capital" without the necessity of declaring stock dividends. All of these cases present exactly the same principle, and when once this is grasped, it should be clear that the failure to pay a tax in the one case where a stock dividend has been used to capitalize the surplus does not involve any tax evasion.

But the more fundamental error comes from confusing taxation of *income* with taxation of *growth of capital*. Economically increase in capital is not income. It is therefore quite right that it should not be subjected to an income tax. On the whole our law, as now interpreted, is logical in this matter. But, it may be said, ought we not to tax in some way the growth of capital? On this question there is room for difference of opinion. I am myself a strong believer in the principle of the income tax and would in general regard the taxation of capital growth as a mistake. Space forbids any adequate discussion of this question in the present article.

In any event, the point is irrelevant to the question of taxing the stock dividend. For if what we want is to tax growth of capital, how can we justify the singling-out of only those corporations which have declared stock dividends for a tax which is not collected from others whose corresponding accumulations have been allowed to remain as surplus? Let it be remembered that the stock dividend is a mere bookkeeping change in the capital account. The growth of capital was already there, and it should be either taxed or not taxed regardless of whether it appears as "capital" or "surplus" on the balance sheet of the corporation. I am, of course, not unaware of the fact that a tax on growth of capital would undoubtedly be held to be a direct tax and so is practically out of the question. The argument that we should, therefore, try to tax stock dividends as income, and so seize upon the growth of capital of some corporations even though we canont reach them all, deserves no serious reply.

ACCOUNTING FEATURES OF THE STOCK DIVIDEND DECISION

A. M. SAKOLSKI

The majority opinion in this case is peculiarly interesting from the accountant's point of view in that it is a manifest endeavor to harmonize the legal and accounting view of profit and income. This is a departure in a way from previous decisions in that at one time the Supreme Court (see *Eyster* v. *Centennial Board of Finance,* 94 U. S., p. 503) decided that profits, and presumably income, were merely excess of receipts over expenditures with no consideration as to either theoretical accruals of either income or expense. Moreover, it is a matter of common knowledge that in tax legislation of both the states and the federal government there has been an utter disregard for the proper use of accounting terminology, so that in the income tax laws of recent years the definitions of "gross earnings", "profits", "income", "revenue", "capital", etc. are frequently applied in taxation in a sense differing from the meaning ordinarily attached thereto by accountants. This was particularly the case in the first federal corporation tax law enacted in 1910.[1]

Justice Pitney makes it plain in his decision that both according to accounting practice and in line with the Sixteenth Amendment of the Constitution, nothing should be considered strictly as "income" either to corporations or to individuals which has not been actually derived and actually determined from some source. He emphasizes the fact that the word *derived* is used in the Sixteenth Amendment to the Constitution, and that, inasmuch as a stock dividend is merely a bookkeeping adjustment, and that the recipient of such dividend *derives* no cash or equivalent evidence of profit, the stock dividend cannot legally be considered as income to the holder. In the language of the court:

"No part of the assets of the company is separated from the common fund, and nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholders' capital interest resulting from an accumulation of profits by the company."

It would seem from this language that the court distinguishes between "profits" and "income". This distinction is undoubtedly a proper acocunting principle, and if strictly adhered to would clear up much of the confusion relating to the legal and accounting interpretations of tax legislation. It should, moreover, in time lead to the adoption of an *actual* rather than the *accrual* basis of income taxation. The trend of judicial decisions in both English and American law have been toward the view that the profits of a business are necessarily the result of an estimate. Hence, in making up its income statements the company could apply as profit accruals of income *not* received and deduct as expenses accruals of liabilities not actually paid. The question whether it is proper to pay out as dividends the part of such profits not received, is a different matter. It should be borne in mind, however, that in the case of banks there are special laws in many states which prohibit the payment of dividends out of profits accrued, but not received, however well secured. Insurance companies are likewise prohibited from distributing dividends on unearned premiums. The correct accounting principle (which is not always correctly applied) is that *nothing can be considered as profit or as income which has not been received in the form of cash or its equivalent.* This has come to mean in modern practice that nothing can be regarded as true profit which cannot be readily determined and converted into cash. Thus, accounting practice permits crediting the income statement with interest accrued but not received, but it does not permit the crediting to income of the increased value of fixed or current assets due to change in book value or in market quotations.

In order to reap the full advantage of Justice Pitney's opinion and thereby avoid future disputes and difficulties in accounting and taxation matters, it would seem advisable that accountants should adopt a more definite policy in the distinction be-

[1] See article "The Corporation Tax and Modern Accounting Practices," in *The Yale Review,* February, 1916.

tween bookkeeping profits and actual income. Sufficient provision has not always been made in the past to prevent corporations from paying out in dividends profits which have only been estimated and which do not represent actual income received by the corporation. The creation of reserves to cover income credited but not received should be a more important matter for accountants in view of Justice Pitney's illuminating remarks in the stock dividend decision.

Another accounting principle emphasized by Justice Pitney is the adherence to the strict separation of capital and income. His view that a stock dividend represents a capital interest only and that an argumentation of value in capital investment is not income to the corporation or stockholder unless the increase in value is realized through a transaction of sale or exchange is strictly in line with correct accounting principles. No capable accountant would permit a corporation to credit as income from which dividends might be paid increases in real estate values or in the market value of such current assets as materials and supplies, unless these assets have been sold or otherwise disposed of and cash or its equivalent actually realized therefor. Justice Pitney aptly points out that market values do not necessarily represent intrinsic values. This is coming to be recognized in making up the accounts of insurance companies and banks whose assets are largely in securities the market quotations of which are determined at a given time by the purchase and sale of an exceedingly small quantity.

Notwithstanding the fact that the Supreme Court's decision in the stock dividend case is an opinion of five against four, it would certainly clear the atmosphere considerably and avoid future wasteful litigation if both legislators and accountants would adopt the definition of income accepted by the court, namely, "income may be defined as the gain *derived* from capital, from labor or from both combined, provided it would be understood to include profit gained through the sale or conversion of assets." This definition is further expanded in the language of the court to mean "*not* a gain *accruing to* capital, not a *growth* or *increment* of value in the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in,* being *derived.*" Whether this attempt at a clear decision would settle the intricate problems involved in income tax procedure remains to be seen.

AN ASSESSMENT ROLL FOR THE INCOME TAX[1]

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In well-ordered taxation there are always three distinct steps: levy, assessment, and collection. Levy, under American law, is a legislative act precedent to, and necessary to the legality of, the other steps. A tax can be levied only by a legislative body and the levy requires a statute or its equivalent.[2] Assessment is the administrative determination of the amount each person is to pay according to the provisions of the levy. Collection (a self-explanatory term) follows, and follows only, after a levy and an assessment. These elementary definitions are repeated by way of preface.

In a direct tax the process of assessment is usually very deliberate and formal. When completed the assessment of a direct tax is generally recorded in a formal document, known by various names but sufficiently described as the assessment roll or tax list. The assessment of a direct tax is in effect an apportionment among the several taxpayers of the amount levied. Sometimes that amount is a determinate sum as $5,000,000. In other cases it is an indeterminate sum, the result of a rate applied to the property, the income, or some other

[1] Reprinted by permission from the *Journal of Political Economy,* December, 1919.

[2] Occasionally, by a careless use of language, an executive office is directed by law to "levy and assess" a tax. But since the legislature cannot delegate its power to levy a tax, such language in a statute is void of meaning so far as the word *levy* is concerned.

base. But in either case, the roll brings together and lists all the taxpayers and shows their respective shares of the tax.

The assessment roll is an important legal document. It is important not only as a record of official action past, but as the legal warrant for future action, collection, and again, thereafter, as the basis of audit. It is good sound law and good safe practice to prescribe that no officer may legally collect a direct tax without the warrant of an antecedently prepared assessment roll. It is long-accepted American theory and practice that the assessor and the collector have distinctly separate functions which may not be intrusted to the same office.

In most of the American commonwealths the formal assessment roll is the sole warrant for the collection of the property taxes. When, as has occasionally happened, some less formal warrant for collection, such as a mere tax bill, is authorized in place of the roll, grief has come sooner or later to the taxpayers and to the government.

The formal roll, as a record of deliberative proceedings officially initiated, has sometimes been regarded as affording one of the earmarks of a direct tax in distinction from an indirect tax. The difference in this respect between a direct tax and an indirect tax is not that assessment, in some form, as an essential step is missing in the indirect tax. Assessment never can be omitted in any tax. But in the case of an indirect tax it is less formal and may be a mere incident to collection. For indirect taxes the collector may be also the assessor. There is no formal roll for the indirect taxes, because the duty to pay such a tax occurs at irregular intervals of time and falls only on those persons coming by their own acts, not by the act and search of any officer, under liability. It is one thing to sit at receipt of customs and take toll of importers. It is quite a different thing to go out and round up, list, and assess all persons subject to a property tax and to value their properties. Customs appraisers, of course, make assessments by valuation too, but they do not write an assessment roll. It lies in the very nature of an indirect tax that no roll can be assembled in advance of liability to pay, while it lies in the nature of a direct tax that liability to pay can be made contingent upon an assessment roll.

The thesis we propose to defend here is that the preparation of a proper income-tax assessment roll, in advance of collection, would vastly improve the administration of the federal income tax. The roll should be conclusive and final for each year as to who is liable to income tax and for how much he is liable. We believe that the failure to make an income tax roll is fraught with danger, involves present practical evils, and that it runs counter to our best traditions of taxation. These traditions were established when democracy was in the making, when the control of the purse by the people through their representatives was first won, and when taxes were made certain and not arbitrary. The roll is one of the means which protect the rights so won. The lawyers have a saying that tax proceedings are always *in invitum*. In so far as this is true, taxation procedure must, like every other invasion of the rights of property and of liberty, follow rules which insure the rights of the taxed. It must also have its proper formal records.

But have we not an assessment of the income tax now? Yes, we have an assessment, but no final and conclusive roll. Moreover, the assessment is far from formal and is more after the model of an assessment to an indirect tax than an assessment to an important direct tax. It is not antecedent to payment, but coincident with or subsequent to payment. The so-called official assessment is more nearly an audit or approval of the taxpayers' own self-assessment than an original officially initiated act.

Let us run over the steps in procedure as laid down in the Revenue Law of 1918, following for sake of simplicity the procedure relating to an individual, a resident citizen. First, each individual decides for himself whether he is taxable or not, and if he decides that he is taxable he makes a return (sec. 223). He files the return with the collector (sec. 227*b*), and pays the whole or one-fourth of the amount that he himself has determined to be due (sec. 250). This is an assessment—of a sort; we may call it self-assessment. It is often the only one there is that is deliberatively made. The collector examines the return and may "increase the amount of the return" (sec. 228), but may not lower it. Possibly if the collector thinks that the return is too high he will allow the taxpayer

to withdraw it and file a new one. This looks a little like an official assessment. But so far as the strict letter of the law goes it is one-sided. It is not technically under the law an assessment at all. Nor is it final. It is more like an audit, although in no way a conclusive audit. It should be added that the department has provided advisors to instruct and guide the taxpayer in making his return.[3]

The commissioner now enters, and "as soon as practicable after the return is filed" examines it. He may raise or lower the amount of taxable income or he may leave it unchanged (sec. 250*b*). This is technically the *assessment*. This step in the procedure is explained by Montgomery as follows: "The Commissioner of Internal Revenue assesses the tax at Washington, but forwards the tax bills to local collectors for delivery to taxpayers."[4] The law does not provide in so many words for tax bills, but for "notice and demand." But Montgomery is right as to the practical effect. It appears then that the warrant for collection is theoretically the order of the commissioner directed to the collector to give notice and make demand. At the best this is a most informal warrant. Before the passage of the Revenue Law of 1918 the tax was not due and payable until after notice and demand by the collector, and a short interval existed for assessment before payment. But under the present law, at least one-fourth of the tax is due at the time the return is filed. That is, payment is required before assessment. This is certainly not orderly procedure.

To carry out his functions the commissioner is armed with experts and inspectors and has the power to round up individuals who have not made a return, as well as those who have, and to examine individuals and their books of account. It will be observed that this is strikingly like the procedure in the case of an indirect tax. The importer comes in with his declaration, the collector examines it, if appraisal is necessary the appraisers act, the tax is due immediately, and the whole is subject to review; meanwhile revenue agents are hunting for smugglers.

But the action of the commissioner is not final and whatever memoranda of assessments he may keep never reach the dignity of an assessment roll. He has full power to reopen any assessment, or to make one where none was made, at any time within five years (sec. 250*d*). That is, a taxpayer whose return, honestly made in good faith, was accepted without criticism by the collector, and whose "notice and demand," or tax bill, followed the figures in the return without change and who has paid accordingly, may at any time within five years be reassessed and have to pay more, or, as the case may be, become entitled to a refund. There is no finality to the assessment until by the lapse of time, five years, a sort of statute of limitations comes into operation. In the case of false fraudulent return there is no time limit, which is perfectly proper. Under such conditions there can be no conclusive roll.

The returns are declared a public record (sec. 257). But the assessments are not so declared. This is striking evidence of the confusion of thought, for it is the assessment, not the return, that ultimately establishes the obligation to pay. Nowhere is there a legally constituted formal tax list or assessment roll, public or other. We venture to repeat that no matter how carefully the commissioner's books may be kept or the collector's lists made up, they do not have the force of a roll.

Let us now compare these scanty provisions for assessment to income tax with the orderly procedure which the experience of many years has created for the assessment to property tax. We follow the type of procedure which is found in many of our commonwealths. The variants therefrom alter in no essential the substance of what follows.

First, there is a return, or declaration by the taxpayer. This is not conclusive either as to quantity or as to value, for it is the duty of the assessor and of no one else to assess. Second, there is an assessment by an office of assessment expressly constituted for that and for no other purpose. The assessor does not act in the capacity of collector, nor is the collector an assessor. Even in very small communities, where for sake of economy the two

[3] The common criticism that the advisors were not well informed, and that it was a case of "the blind leading the blind" is distinctly unfair to the intent and purpose of the advisor plan. What was done was distinctly the best that could be done under the circumstances and under the provisions of the law.

[4] *Income Tax Procedure*, 1919, p. 130.

offices are in the same person, he acts admittedly and distinctly in two different capacities, and at different times in each. The separation of these functions is regarded as essential. Third, comes the preparation by the office of assessment of a formal roll. This roll is hedged about with all manner of safeguards and is a public document of the very first importance as regards the validity of the taxes and also as regards the property rights affected. Informality invalidates. In some cases an informality so slight as the omission of the dollar mark before the figures has been held to invalidate the assessment. The roll is legal evidence of tax liens. Fourth, there is a review by local boards and sometimes by other authority as well. The review may be initiated either by the government or by the taxpayer. Fifth, comes the extension on the roll by the properly constituted auditing authority of the taxes due; that is, the multiplication of the assessment by the rate. At the end of this stage the assessment proper is finished. The final and conclusive roll has been written. Doom has been pronounced and sealed. No one can again be placed in jeopardy for that year's taxes. Sixth, the roll so constructed passes to the collector and becomes his warrant for collection. On it he enters for permanent record the taxes paid and those which went delinquent. Seventh, when the collection for a given year is completed, the roll serves its final purpose as the basis of audit and record. It enables the collector to secure his clearance for taxes collected and for taxes delinquent. It serves as the record of tax liens removed and of liens still running.

Steps one to five result in the formal roll, which, save for the necessary reservations as to clerical errors and detected frauds, is final and conclusive as to the taxes assessed for the year. There is normally no such thing as reopening the roll or any entry therein, nor of adding thereto. In passing it may be noted that sufficient time is usually allowed for each of the first five steps to safeguard the interest both of the government and of the taxpayer.

The question may now be asked whether, in the case of the federal income tax, the disregard of logic, the breach of long-respected legal theory, and the non-observance of the teaching of experience have resulted in any serious practical evils? Is it merely a matter of form and of red tape that we are discussing or is it the kind of unseemly haste which proverbially makes waste? We believe that evils have resulted and that there is afforded by the lack of system, uncertainty, and informality a fertile ground in which other evils may spring up. It may be that the evils have not culminated yet in a way to be acutely felt. But now that the war is over and people will be inclined to be more critical of and to resist arbitrary taxes, these evils will be more acute.

We are not attempting here to exhaust the subject, so we may be content with mention of the three chief evils traceable mainly to the absence of an assessment roll, but partly to the loose methods of assessment which make it hard to write a roll.

1. For the enormous sums collected since 1913 in income taxes (and in excess and war profits taxes) from individuals and corporations, no taxpayer, individual or corporate, save only the very few whose cases have been adjudicated in court, has yet received a final clearance of the tax liability for any one year. Every return, every failure to make a return, whether proper or not, is still open to review. All that the taxpayer has to go on is, at first, the silence and apparent acquiescence of the commissioner, then an inconclusive revisable "notice and demand," and finally (if he has chanced to demand one) a receipted bill for the amount he has paid, but which gives no assurance that it was the right amount. Liens have run against his property and have, presumably, been removed. But the only evidence there is of removal is the receipted tax bill and that is inconclusive evidence. By regulation one's own cancelled check is just as good as a receipted tax bill. There is no public record of the removal of the liens. No taxpayer can know when the whim of some officer, the hobby of an expert, the vagaries of an inspector, or a change in the rulings of the commissioner may cause his return or failure to make a return for any year past to be "re-examined" and the tax recomputed. On any day he may receive a curt note reading in substance: "Your income tax for the year .... has been re-computed. Pay the collector within ten days $....." We should not be mis-

understood to imply that a lien for taxes attaches until there has been an assessment or reassessment. Property transferred is not followed by a lien for income tax unless it is transferred in the interval after "notice and demand" but before payment. The evil is not a blot on titles so much as the inconvenience perpetually impending of a sudden and unexpected demand. It is this uncertainty that is so disconcerting. Nobody knows when or where the lightning may strike, and the thunderstorm lasts five years.

2. The method of inspection, a thing made necessary by the loose procedure and by the absence of a roll, is essentially a post-payment or post-due assessment. It is like a post-audit where pre-audit is indicated. It is, moreover, since it follows a presumptively fair self-assessment, a spy system, and is undignified and autocratic, especially when applied to a direct tax. The method is essentially the same as is used to run down smugglers and "moonshiners." It is applied alike to the just and the unjust. It has all the evils of the iniquitous "tax inquisitor system" except those which arose from the fact that the inquisitors were paid by commissions. It has the essential wickedness of penalizing the innocent citizen for administrative and legislative neglect. There is a deal of difference between sending out deputy assessors to list the taxpayers before assessment and sending out detectives to catch delinquents after assessment. With the assessor the taxpayer can cooperate; before the inspector he stands on the defensive. It is a method well calculated to cause friction and to engender obstinacy and resistance.

3. Despite the seemingly extraordinary and unusual powers bestowed on the taxing branch of the government, the absence of an assessment roll leaves the government weak at very essential points. Not only do its officers collect money on a very imperfect warrant, largely by the grace and consent of the taxpayers, but these same officers can never get a full and complete clearance of duty done or of taxes honestly collected and duly accounted for. It is quite true that dishonest men cannot be made honest by any machinery of bookkeeping or by tricks and devices of audit. But it is also true that honest men can be tempted to dishonesty, and dishonest men given facility for stealing by loose methods. There is no known method of audit for taxes due and collected as good as that system which centers around the assessment roll in the manner outlined above as used in the property tax. The absence of an assessment roll antecedent to the collection of the income tax makes the misappropriation of public money collected, the collection of "fake" taxes, and the compounding of evasion so easy and so safe as to constitute a severe test of the fiber of honesty in our officials and in our taxpayers. But worse even than the opportunity and incentive to actual crime which the method involves, the present system puts the honest collector and the conscientious inspector where he can never disprove a false charge of malfeasance. Furthermore, since the taxpayer has no roll or other public proof of assessment to refer to, the suspicion that he has not been properly assessed is ever present.

How we fell into this mess is not at all easy to understand. One would have thought that the general principles involved were too familiar to be forgotten. Yet it seems to have been believed that the federal government is superior to those practical mandates to which the sovereign commonwealths see fit to bow. Historically, there were proper assessment provisions in the Civil War income-tax law. Those broke down, as is well known, because of the imperfections of the civil-service system at the time. While much of the Civil War tax law was copied into the law of 1894, the assessment provisions were not so copied. The law of 1913 followed in turn the omissions of the law of 1894. But that tax was small and the number of taxpayers was not large. There existed at the time the strong and well-organized office of internal revenue, to which it was natural to turn over the new tax. Perhaps it was natural, too, that this office should follow for this new but direct tax the methods of collecting indirect taxes to which it was accustomed. Then came the war with its need for new revenues—now, right away, in a hurry. Deliberate assessment takes time, and the situation demanded that there be no loss of time.

But possibly more decisive than any other factor affecting our question has been the prevailing desire for secrecy of the returns and of the individual's tax. One's income seems such an intimate matter.

This doubtless influenced the method of assessment. Lastly, there was and there still is a widespread but erroneous belief, born of ignorance and inexperience with income taxation, that income is an easy thing to determine.

It should after these years of experience be obvious to all that income is not at all easy to determine and assess. If anything, it is harder to determine the incomes of a million people than it is to determine their properties. Not even the defining of income is easy. Economists have written many volumes about it, and by way of illustration of the difficulties encountered one may cite the fact that Professor Irving Fisher in his big book comes to the conclusion that income as he sees it and defines it would not afford a practical basis for an income tax. The income-tax law itself goes into many minutiae as to what is taxable income and what is not. The official rulings in interpretation of the law now fill more than a five-foot bookshelf. The courts have decided some points, but not many. One of the most important is now before them, namely, whether increment in property value is income. In face of all this, it is naïvely assumed that every taxpayer can assess his own income with such accuracy that no more formal procedure of assessment is necessary than can be found in so casual an inspection of the return as is now contemplated by the law. There is truly as much room and need for the exercise of sound judgment and wise discretion in the assessment of income for taxation as there is in the assessment of property. All of this points with equal force to the necessity for an assessment roll, without which the best efforts are apt to be inconclusive, if not vain.

There may be reasons which can be advanced in favor of self-assessment to income tax other than the desire for secrecy. But it seems safe to assert that the reason for self-assessment which has the widest appeal is the desire to keep one's affairs from the prying eyes of one's neighbors and of gossips. Possibly the fear from which this desire for secrecy springs may wear away with longer familiarity with the new tax. Some secrecy will have to be sacrificed in any more efficient method of assessment. How much would be sacrificed would depend on the machinery adopted and the number of officials involved. There does not, however, appear to be any large degree of annoying publicity involved in the current method of assessment to property tax.

But the main point here is with the assessment roll. This would necessarily be what the returns are now declared to be, a public record. But it could not be held so screened from the public eye as are the returns now. Some degree of secrecy would be sacrificed. The roll must, to serve its purposes, contain the name of each taxpayer, his taxable income in at least such detail as would show the application of the rates, and finally the amount of tax due. More it need not contain. Since it is a record of taxes assessed and ultimately of taxes paid, it is a record of facts and conclusions only. It need not contain the information on which the conclusions were based and the returns could remain, as now, confidential between the assessor and the taxpayer. It is not necessary (we do not now raise the question of desirability) that the roll be given any more publicity than such as now actually results in most states from the property tax roll. Those rolls are inspected by taxpayers in connection with review and, when looking up their taxes, by searchers of records and by others properly interested in the liens which the taxes create. It is rare indeed that they are examined by anyone from idle curiosity or for purposes unfriendly to the taxpayer. The amount of usable information which a business rival can glean from them is insignificant. Exactly so would it be with the income tax roll. Whether the publicity involved is likely to prove so annoying as to warrant the continuance of the evils above alluded to is something upon which opinions may differ. It is our opinion that the loss in secrecy would be so trivial as to be negligible.

Unless we wander off into vague philosophical considerations, such as the importance of making civic duties felt, the only reason for self-assessment other than secrecy is the advantage of using the taxpayer's intimate knowledge of his own income. But this applies to the declaration or the return with far more force than to the assessment. It has little bearing on the main question, which is as to the need of an assessment roll, however the assessment may have been made.

Alarm may be felt that the proposed change would cause added expense. We are of the opinion that it would result in a saving. It is always more economical in the long run to be tidy, accurate, and systematic than to be loose and slipshod. Besides, the taxes now lost and the money sure to be embezzled and otherwise misappropriated without a roll will easily pay for the writing of a roll many times over. But even if it did cost the government something, the gain in certainty to the taxpayer is worth infinitely more.

The thesis for which we have been contending is so simple that an appeal to authority seems almost superfluous. Textbook writers legal and financial alike have few words on the subject, for they all take for granted the principle involved, namely, the necessity for certainty. What we have said above is no more than the application to a special case of the famous dictum of Adam Smith which might have been written with the very same facts before him:

> The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, *ought all to be clear and plain to the contributor, and to every other person.* Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favors the corruption of an order of men who are naturally unpopular, even when they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that *a very considerable degree of inequality,* it appears, I believe, from the evidence of all nations, *is not near so great an evil as a very small degree of uncertainty.*[5]

It may be contended that the foregoing discussion, being confined to the roll, does not go far enough, that more accurate, or, to use an overworked term, more "scientific" assessment is necessary as well, and that boards of review more accessible to the taxpayers than the commissioner, "way off in Washington," are desirable. The contention is cordially accepted. But although it would be not too difficult to outline on paper a model system of assessment to income tax, it may be observed that it is the lesson of history that practical methods of assessment are more likely to grow out of a series of felt necessities than to be successfully invented in the closet of a theoretician. The assessment roll is an obvious immediate necessity; it is the easiest, first step to take.

[5] Italics are ours.

NOTE

Friends who kindly read this article in the manuscript have made several suggestions of importance which should be added. Professors Seligman and Haig thought that there are other weaknesses in the administration which might receive attention as well as the one alone covered in the article. They also suggested that there would be a problem arising from our practice of allowing reports on the basis of fiscal years. It is obvious that if the returns do not all come in at the same time the writing of a final and conclusive roll is difficult. It appears to me, though, that this is a matter of technical detail. There is no impossibility in having a roll a part of which closes at one date and another part at another date. It would be better than none at all, or one that never closes. There is a question, however, whether the alleged convenience to the taxpayer of reporting for his own fiscal year is worth the confusion to which it even now gives rise.

The same gentlemen have suggested that a review of the practices of other countries would throw light on the points raised. It no doubt would do so, but I am inclined to think that we must be guided by American practice and principles and that we have ample home experience in this technical matter. The Canadian income tax law does provide for a roll and for a short period for making the assessment. It also gives the taxpayer a proper hearing and review. The time allowed is none too long and the law is none too clear. But the principle for which my article contends is recognized. Great Britain's tax is largely an assessed tax and it is, moreover, a tax on "property and income" so different in form and administration from ours that there is no parallel. In one respect, however, we could copy after them to advantage. That is in providing the taxpayer with a proper local board before which he can present his grievances and which has the power to afford him immediate relief and reimbursement if he be entitled to it. As the matter now stands in the United

States it costs a great deal of money, time, and trouble to get a hearing and an adjustment of an unfair tax.

Professor Millis thinks that too little emphasis was placed on the difficulty of assessing income and the necessity for time in which to do the work properly. Although the matter is mentioned in the foregoing article, he is no doubt right as to its great importance. For making the assessment for the property tax we allow a period varying from three months to seven months. The work of assessing an income tax is more difficult than that of assessing a property tax.

Professor Millis also suggests, and I agree with him, that collection at the source may have had something to do with getting us into this mess. In another article, to appear in the December, 1919, issue of the *American Economic Review,* I have discussed some of the discriminations which arise from the taxation of dividend income at the source.

Although indeed grateful for these suggestions, I have left the article as it was originally written because I desired to hew as close to one line as possible. The one line is: *Let us have an assessment roll.* All other matters are illustrative or relate only to the possible form of the roll or methods of assessment. I am satisfied that with three hundred years of experience, and the present practices of fifty-two states and territories to draw upon, we know how to frame the details of a good assessment system. We all know perfectly well what are the methods that are sound and just, what perils to avoid. All that is lacking is the will to have an assessment system. C. C. P.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

INCOME TAX, FEDERAL — DIVIDENDS FROM SURPLUS ACCUMULATED PRIOR TO 1913.—The United States supreme court, following its decision in *Lynch* v. *Hornby,* 247 U. S. 339, has held that dividends declared from earnings accumulated by a corporation prior to the adoption of the Sixteenth Amendment, payable thereafter, are taxable in the year when received.—*Union Pac. Coal Co.* v. *Skinner,* U. S. Sup. Court, March 22, 1920. *Per Curiam.*

FEDERAL MUNITION MANUFACTURERS' EXCISE TAX—"MANUFACTURING".—The three cases involving the federal tax on munition manufacturers, noted in the December 1919 BULLETIN, p. 85, have just been decided by the United States Supreme Court, judgments being affirmed in each.

These cases, it will be remembered, involved the question of whether a corporation contracting with the British and French Governments for the delivery of shells, was a "manufacturer" where its own share in the production covered only a portion of the steps in the process, the remaining steps being taken by other corporations through sub-contracts, and also whether the processes of sub-contractors constituted them "manufacturers" of munitions or of parts thereof.

The court readily decided these questions in the affirmative, holding as to the first that laying aside the provision of the act making a manufacturer of a "part" of the articles subject to the tax, the contention that all the operations involved must be taken by the same person would reduce the act to a nullity, would make it miss its purpose; that it contemplated that the person in question would make of other aid and instrumentalities, machinery, servants and general agents, which when availed of for profits would not enable the latter to escape the tax.

To the contention that the sub-contractors were taxed on their profits arising from their portion of the work, the court replied that the question was as to the correctness of the tax upon the person under consideration and not that of the sub-contractors.

On the second question, whether the action of sub-contractors in furnishing some of the processes in the construction of the completed shell was the manufacture of a "part" within the meaning of the act, the court was equally positive, holding

that every element in the composition of a shell was a "part" of a shell, and querying that if not, when is something which is necessary to constitute a thing not a "part" of that thing? Petitioners' resort to the dictionaries was asserted to erroneously impute to Congress an intention to deal in artificialities and fine distinctions. The shell body was not completely manufactured by either the contractor or the sub-contractor but by the two acting together, and each was liable for the profit it made.

In only one of the cases was reference made to authorities, and then only to those cited from the Supreme Court by petitioners in support of their claim. These cases were *Tide Water Oil Co.* v. *U. S.,* 171 U. S. 210, 207 U. S. 556; *Worthington* v. *Robbins,* 139 U. S. 337, and *Anheuser-Busch Assoc'n* v. *U. S.,* 207 U. S. 556, and were readily distinguished. — *Carbon Steel Co.* v. *Lewellyn; Worth Bros. Co.* v. *Lederer* and *Forged Steel Wheel Co.* v. *Lewellyn,* U. S. Supreme Court, March 1, 1920.

Penalty Inheritance Tax in New York—Construed to Permit Option.— The Appellate Division of the New York Supreme Court has affirmed the modified order of the Surrogates Court (170 N. Y. Supp. 1063) holding that the securities of a decedent, a resident in New York City, purchased after October 1st of one year (that being the assessment date) and the death occurring before October 1st of the following year, could not be assessed for the penalty tax upon such securities found in his estate after death, upon which the investments tax had not been paid.

The court held that the act contemplated that the taxpayer should have the option of either paying the investment tax or the personal property tax; that as decedent never had the opportunity to pay a personal property tax on the securities, he never had the option, and his failure to pay the investment tax did not subject the securities to the inheritance penalty tax.— *In re Otis' Estate,* 180 N. Y. Supp. 313. (See Bul. IV, 1, p. 60.)

Licenses—Counties as Political Corporations. — The constitutionality of a county license tax on motor vehicles was attacked for lack of uniformity and because the Arkansas constitution did not authorize counties to impose such taxes. The court held that the uniformity clause did not apply to license taxes and also that the provision authorizing the General Assembly to delegate the power to impose license taxes to its "subordinate political and municipal corporations" authorized the license tax in question. Reference was made to its own decisions and to quotations from Blackstone and Kent to the effect that a county is a public corporation having functions similar to those of a municipal corporation and is an agency of the state. — *Pine Bluff Transfer Co.* v. *Nichol,* 215 S. W. 579.

Banks—Double Taxation.—In a recent case the opinion of the Colorado Supreme Court in reversing the action of the lower court in sustaining a demurrer is too brief to enable one to fully understand the exact facts, but evidently an assessment was made against a bank which included its tangible property, its deposits and also its capital, surplus and undivided profits. This was held to be taxing the same property twice and unlawful.—*Murray* v. *Board of Commis'rs,* 185 Pac. 262.

Jurisdiction—Personal Property on Military Reservation. — In an exhaustive opinion with extensive citation of authority, and copious extracts from numerous opinions, the Washington Supreme Court held that the personal property of a corporation having a concession at Camp Lewis military reservation which had been donated to the United States Government by Pierce County, with the consent of the state, was not taxable by the county authorities. The reservation was held not a part of the state, and therefore without its jurisdiction for taxing purposes.

Elaborate discussion is made of the varieties of jurisdiction existing with respect to such reservations and other similar federal property, depending upon the method of acquisition, the terms of the statute authorizing the grant, and other details, with extended quotation from the leading case of *Ft. Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525. Reservation is expressly made of the question of whether the state could tax the property in question as personal property at the office of the corporation in the state. — *Concessions Co.* v. *Morris, Sheriff, et al.,* 186 Pac. 655.

PUBLIC UTILITY ASSESSMENTS — BASIS OF VALUATION — UNIT RULE — REPORTS TO PUBLIC UTILITY COMMISSION AS EVIDENCE. — Following the decision of the Montana Supreme Court (108 Pac. 708), noted in the BULLETIN of December 1919, p. 93, issue was joined and the action of the State Board of Equalization with respect to the assessments of the property of the power companies in question was reviewed upon the report of a referee.

Exceptions were taken to the exclusion by the referee, as evidence offered by the state, of several reports made by the companies to the Public Service Commission, such reports being offered as evidence that the companies themselves treated the properties as an entire plant and not as segregated parts and also as showing the cost of the plant from which a basis for the valuation was to be inferred, which it was claimed the Board did not follow, thus disclosing its failure to comply with the statute in making the assessments. The court upheld the referee in excluding this evidence, holding that the question of the character of the property as an entire plant and thus subject to its jurisdiction rather than that of the local assessors, was one to be determined by the Board itself, as a conclusion of law from the facts before it. It was wholly immaterial how the companies considered their properties. Nor was this evidence competent to show the value of the property. It was not within the province of the court to determine values for purposes of assessment. Its function was to determine whether the Board had done so and in the manner required by the statute.

The real question, thus stated, was limited to a test of what the Board actually did, the function of the writ of mandamus being not to correct errors or for a valuation but to compel action. The court is powerless to compel the Board to proceed in any particular manner (*Cooley on Taxation,* 2d Ed. 730; *Danforth* v. *Livingston,* 59 Pac. 916). Except in case of abuse of discretion, action of assessing officers' mandamus will not lie, even though the result reached is clearly unjust and erroneous. Nor can the court inquire into the minds of the taxing authorities in fixing values in such a proceeding (*R. R. Co.* v. *Babcock,* 204 U. S. 585).

Coming to the actual procedure of the Board, it appeared that its action consisted in merely increasing the valuations of various specific pieces of property by a given per cent. This the court held was not a compliance with the act which contemplated a valuation of the entire property as a unit, a deduction of properties locally assessed and a distribution throughout all the counties involved of the difference, thus assigning to each county its appropriate share of the value of the entire property considered as an entirety with the added value attributable to it as a continuous line. The failure to conform to this method provided in the statute vitiated the assessment made just as fraud or the adoption of a fundamentally wrong principle would vitiate it (*C. B. & Q. R. R., supra*).

The method pursued by the Board could not be said to have prevented a right conclusion. The method prescribed by the statute, however, was not followed, and if a correct conclusion was reached it was merely an accident. In departing from the statutory method, the Board failed to pursue the method devised by the new laws passed as a result of the tax and license commission whose report is referred to as indicating the intent to remove the evils theretofore existing, arising from the assessment of parts of inter-county properties by the local assessors of each county and which resulted in ridiculous inconsistencies as between counties and the escape of those elements of value arising from a continuous and connected operation of the whole.

The writ of mandate was ordered to be issued directing the Board to reassemble and assess the inter-counties properties of the companies in question.—*State* v. *State Board of Equalization,* 186 Pac. 697.

PUBLIC UTILITY VALUATION — ELEMENTS OF VALUE. — A recent decision of the United States Supreme Court has aroused much newspaper comment and has been referred to as suggesting an important change in the basis of valuation in rate cases. The real matter in controversy was as to the duty of the Interstate Commerce Commission, in reporting upon values of carriers under the act of March 1, 1913 (37 Stat. 701) amending the "Act to regulate commerce." One of the steps directed to be taken by the Commission

was to ascertain and state in detail and separately from the improvements, the original cost of lands, rights of way and terminals, the present value thereof "and separately the original cost and present cost of condemnation and damages or of purchase in excess of such original cost or present value." The commission refused to incorporate in its final report upon the property any itemization responsive to the direction above quoted, alleging inability to do so for the reasons elaborated in a similar refusal in another proceeding then pending (I. C. C. Val. Rep. 1, p. 54), viz.: the "impossibility of making the self-contradictory assumptions which the theory requires."

This proceeding was taken to compel the commission to obey the provision in question. The court observed that it was called upon to decide not a controversy growing out of duty performed but one solely involving an alleged refusal to discharge duties, exacted by the statute, a purely ministerial matter; that while the commission held its inaction caused by a command to consider matters "beyond the possibility of rational determination" called for "impossible hypotheses" as to subjects "incapable of rational ascertainment" and that such conclusions were the necessary consequence of the holding in the *Minnesota Rate Cases* (230 U. S. 352), such conclusions were erroneous, were caused by a mistaken conception by the commission of its relation to the subject and an unconscious disregard of the power of Congress and an unwitting assumption of authority it did not possess.

The reliance upon its view of the ruling in the *Minnesota* cases, even assuming it correct, illustrated still further a disregard of the power of Congress, it being impossible to conceive how, if Congress had power to impose the duty, that ruling could justify a refusal, particularly as it was made prior to the passage of the act in question. It was further held that because the inquiry opened up a wide range of proof and called for the exercise of close scrutiny and scrupulous analysis, that afforded no basis for the refusal to enforce the very Act under which its power was being exerted.

It will thus be seen that no important question of valuation can fairly be said to have been passed upon by the court in this case, the effect of the decision being merely to interpret the duty of the commission under the statute.

The judgment of the District of Columbia Court of Appeals was reversed with directions to reverse that of the superior court and to direct that court to grant a writ of mandamus in conformity with the opinion.—*U. S. ex rel. Kansas City So. Ry.* v. *Interstate Commerce Commission,* U. S. Sup. Ct., March 8, 1920.

CORPORATIONS—CAPITAL STOCK TAX—DEDUCTION OF SHARES IN OTHER CORPORATIONS—DISCRIMINATION. — In affirming by a five to four decision a judgment of the Arkansas Supreme Court (198 S. W. 702), the U. S. Supreme Court has, in effect, further emphasized the doctrine often stated and more often followed without statement, that that court is not to be considered a haven of refuge for taxpayers aggrieved by some real or fancied outrage perpetrated by state officers acting under state authority. The grievance must be more than just. It must arise through some definite violation of the federal constitution and the court is by no means inclined to broaden the scope of that instrument in tax cases. The trend in tax cases seems to be more and more to place the correction of unjust taxation with the state legislatures and the state courts and to discourage resort to that court for relief.

The briefs in the case in question contain elaborate arguments as to the fundamental conceptions of the corporate form of business and much detail as to the theories of corporate taxation. The court utterly ignores all this elaboration and, apparently fully appreciating the injustice complained of, rests its opinion upon absence of a definite violation of rights guaranteed by the fourteenth amendment.

The complaining corporation urged such violation because of the failure of the state court to construe a statute imposing a capital stock tax upon it, so as to authorize it, in reaching the value of its capital stock, to deduct the shares owned by it in other corporations, also taxed on their capital stock, as was permitted in the case of individuals, thus imposing what it claimed double taxation and a discrimination in violation of the federal constitution.

As suggested above, the court sweeps

these claims aside although admitting the provocation for them, saying that the objection to the taxation as double "is a matter of state law alone. The fourteenth amendment no more forbids double taxation than it does doubling the amount of the tax: *Davidson* v. *New Orleans,* 96 U. S. 97; *Tennessee* v. *Whiteworth,* 117 U. S. 129, 136, 137; *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 367, 368"; that so far as the federal constitution is concerned a state may "tax its own corporations in respect to stock held by them in other domestic corporations although unincorporated stockholders are exempt." A state may have a policy in taxation, *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 63, that it may discourage the holding of stock of one corporation by another through taxation or make it pay for that privilege; that a discrimination between corporations and individuals in a tax like the one in question "cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the state to insert the distinction in the law."

Another discrimination was asserted in that the proceeding was instituted to collect back taxes under a statute which permitted this in the case of corporations and not as to individuals. This also was held not a denial of rights under the federal constitution; that the policy could not be pronounced unlawful (*New York Clearing House Building Co.* v. *Barker,* 179 U. S. 279, 283).

The elaborate arguments made as to the limitations of the state constitution upon the powers of the state were dismissed with the statement that those questions were for the state court alone and were taken as disposed of by that court whose judgment was affirmed.

The opinion in this case, which is very brief, has been noted at length because it seems to contain, by implication, matter of considerable importance. The lesson it teaches is that, after all, justice in taxation must be sought for in the state legislative halls and before state administrative officers and state courts. Mr. George Vaughan, who represented the state, advises that his opponents refer to the decision as an "unholy victory."—*Fort Worth Lumber Co.* v. *Arkansas,* U. S. Sup. Ct., March 1, 1920.

SPECIAL ASSESSMENTS—DUE PROCESS—DISCRIMINATION.—The United States Supreme Court was invoked in a recent case for relief from an alleged discriminatory assessment for sewer construction imposed under the St. Louis charter.

In this case the provisions of the charter contained such detailed requirements as to the construction in question as apparently to authorize the writ of error taken from the decision of the Missouri supreme court affirming the judgment of the lower court (273 Mo. 184), the sewer districts being established by local authorities and this action having the force and effect of a statute of the state.

It was held that the court would only interfere with the acts of local authorities in cases where such action was found to be arbitrary or wholly unequal in operation and effect (*Embree* v. *K. City Road District,* 240 U. S. 242; *Witherell* v. *Construction Co.,* 249 U. S. 63; *Hancock* v. *Muskogee,* 250 U. S. 454; *Branson* v. *Bush,* December 22, 1919); that as the state court has held that the mere fact that the drainage might have been accomplished without the construction complained of, did not justify its interference with the discretion much less did there exist reason for it under its supervisory power under the federal constitution to reverse that action. — *Goldsmith et al.* v. *Prendergast Const'n Co.,* U. S. Sup. Ct., March 1, 1920.

SPECIAL ASSESSMENTS — DUE PROCESS. —Improvement assessments levied pursuant to the Charter of the City of Denver, were objected to as lacking in due process because no adequate hearing was permitted the taxpayers before a board with power to hear complaints and make corrections. It was asserted that the board provided had power merely to recommend to another board whose action was final. The state supreme court had denied relief and sustained the assessment (171 Pac. 66). The petitioner did not avail itself of the privilege of a hearing before the board but began this proceeding to test the constitutionality of the act. The court held that the proper construction of the charter was for the state court, and that that court had, in prior cases, construed the section then in effect, which was the same in terms as the one under review, not to deprive

taxpayers of a proper forum for review or the legislative body of jurisdiction to act upon complaints (33 Colo. 80, 94, 104); that these decisions had been tested on constitutional grounds by it (*Londoner* v. *Denver,* 210 U. S. 373) and found not open to objection on such grounds. As plaintiffs had opportunity to be heard before the duly constituted board, they could not be heard to complain now.—*Farncomb et al.* v. *City and County of Denver,* U. S. Sup. Ct., March 1, 1920.

WRITS OF ERROR—WHEN ALLOWED.—Recent rather frequent appearances in supreme court decisions of the fatal words "Petition denied" with a reference to section 237 of the Judicial Code, as amended by the act of September 6, 1916, have at times seemed puzzling. The explanation is disclosed in a decision which may serve to obviate useless resort to the Writ of Error in tax cases and which also indicates a practical limitation upon relief from unjust taxation.

The case arose from an attempt by the state to collect taxes upon an assessment by the State Board of Valuation of Kentucky, covering property that had already been assessed by the municipal authorities, the latter assessments being claimed unauthorized. As one defense, the taxpayer alleged discrimination through uniform underassessment generally which was urged as raising a federal question and which was evidently so deemed by the Kentucky Court of Appeals, as appeared from its opinion (178 Ky. 561, 566), wherein reference was made to the *Kentucky Franchise Tax Cases* (244 U. S. 499).

The importance of the opinion of the United States Supreme Court lies in its reasons for dismissing the writ. The judgment of the Kentucky court was rendered after the act of September 6, 1916 became effective, and thus that act was held to determine the right to have a review. The act provides for a review when a question of the validity of a statute or authority, tested by the provisions of the federal constitution, is decided by a state court. What is meant by the validity of a statute or authority was discussed in *Balt. & Potomac R. R. Co.* v. *Hopkins,* 130 U. S. 210, in which case it was said "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied the validity of such statute is drawn in question, but not otherwise."

It was thus held that mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error; there must be a challenge of the validity of a statute upon a claim that it is repugnant to the federal constitution so as to require the state court to decide the question of the validity (*Champion Lumber Co.* v. *Fisher,* 227 U. S. 445).

Thus here the mere allegation of unjust administrative action in assessing some property at full value while other property was assessed uniformly and habitually at a fraction thereof, was held not to bring in question the validity of the taxing act so as to authorize the issuance of the writ, and it was accordingly dismissed.

The practical result is the denial of resort to the Supreme Court in a large class of cases to secure relief from state taxation methods. Doubtless extra incentive is thus given to begin tax proceedings in the federal courts but there are limitations upon this procedure through the customary objection that the taxpayer has an adequate remedy either before administrative officers or through a definite state law. Choosing a remedy for relief from unjust taxation is thus seen to require careful consideration.—*Jett Bros. Distilling Co.* v. *City of Carrollton.* U. S. Sup. Ct., March 1, 1920.

LICENSES—AUTHORITY — RETROACTIVE EFFECT—SEPARATE BUSINESSES. — It was held that a license tax levied upon the business of purchasing leaf tobacco was not objectionable as being a mere incident to the right to manufacture tobacco, such purchasing being a well-recognized business. It was, however, held that a separate license tax could not be imposed for conducting the business of packing leaf tobacco as that was a mere incident to the manufacturing and could not be made the subject of a separate tax.

It was held that a license tax could be increased before the time for enforcement, even though collection had been made at the previous rates.—*American Tobacco Co.* v. *Danville,* 99 S. E. 733.

Licenses — Liability of Lawyers—Authority to Levy.—An attorney-at-law of the Nevada Bar, resisted the payment of a city license tax, alleging constitutional grounds; that the right to practice law was a vested right and could not be burdened with a tax and that it violated the due process clause.

The court referred to the one case holding with the plaintiff [Lawyers' Tax cases, 8 Heisk (Tenn.) 565] as being by a divided court and as being opposed to the universal weight of authority, citing numerous cases. It was also urged that as the right to impose such taxes was not expressly given in the constitution, no such right existed. The court readily held this definitely opposed to well-recognized authority.—*Ex parte Dixon,* 183 Pac. 642.

Licenses — Trading Stamps — Discrimination. — An elaborate opinion appears in the decision of the Maryland court sustaining a license tax imposed upon the giving of trading stamps redeemable in merchandise. The ordinance was attacked upon every conceivable constitutional ground and the opinion contains full reference to the authorities. It is held that such a tax is a valid exercise of the police power, is not discriminatory because of exemption to one issuing stamps in connection with the sale of his own products or because not applicable to one redeeming the stamps in cash or because arbitrary.—*State* v. *J. M. Seney Co.,* 107 Atl. 189.

License—Peddlers. — The agent of a non-resident concern engaged in selling goods from a wagon, direct to customers upon a commission basis, was subject to a license tax as a peddler and was not exempt as being a clerk; even if he were an agent of the foreign concern he would still be subject to the tax, as no question of interstate commerce was involved.—*Ballard* v. *Russell,* 82 So. 730.

Inheritance Tax—Trust Deed—Deduction of Federal Estate Tax—Construction of Statute Adopted from Another State. — Decedent during his lifetime transferred certain property to a trustee to hold in accordance with the provisions of the trust deed. The evidence showed that he did not thereafter concern himself with the management of the property conveyed, but treated it in all respects as an absolute conveyance; that although power of revocation was reserved in the deed it was not exercised. Upon the death of grantor it was sought to impose an inheritance tax upon the trust property upon the ground that the power of revocation was in itself sufficient to render the transfer subject to tax as made in contemplation of death or as intended to take effect after death. The court rejected this contention, holding that the facts in the case disproved the claim. It was further held that as the portion of the act sought to be applied was copied literally from the New York statute and as the courts of that state had construed it as not applicable to a trust deed such as was here involved (*In re Masury's Estate,* 53 N. E. 1127), this construction would be deemed adopted (*People* v. *Carpenter,* 106 N. E. 302).

It was also held that the federal estate tax was an expense of the estate and should be deducted before computation of the tax (*People* v. *Pasfield,* 120 N. E. 286).—*People* v. *Northern Trust Co.,* 124 N. E. 662.

Inheritance Tax — Deed with Reserved Power of Disposition — Effect of Administrative Practice.—A recent case involved a point which the Maryland court of appeals held not before determined. A testatrix had during her lifetime deeded all her property to a trustee, reserving power of revocation, of testamentary disposition and beneficial use during her life. Upon her death, pecuniary legacies were held subject to the collateral inheritance tax as against the claim that inasmuch as the legal title to the property had passed from testatrix, there was no liability for any tax. The court held that while it was true that although the original statute imposing the tax was passed in 1844 and that no attempt had been made to collect it in such a case, this long and unbroken administrative omission or misconstruction could not stand in the way of the clear language of the statute under which a tax applied to transfers "made or intended to take effect in possession after the death of the grantor" and that the deed in question was in reality within this provision. — *Smith* v. *State,* 107 Atl. 255.

Inheritance Tax—Gifts in Contemplation of Death. — A clear exposition of the law relating to the taxability of "gifts made in contemplation of death" is to be found in a recent Illinois case.

"No general rule can be formulated," says the court, "but if, upon a consideration of all the surrounding facts and circumstances, it is apparent the donor's condition was such that he might reasonably have expected death at any time, and the disposition made of his property is such as he had contemplated making in that event, or such as he might reasonably be supposed to have desired to be made at his death, and no other moving cause is apparent for making the transfer at the time it was made, the gift will be deemed to have been made in contemplation of death, even though the transfer be absolute in form and such as would invest the donee with absolute right to the property during the lifetime of the donor."

It holds that the inheritance tax law was not intended to prevent a person from disposing of his property in any legitimate way he sees fit, nor to prevent a parent, in his lifetime, from giving to his children the whole or any part of his estate, so long as the gift was not intended as a "testamentary disposition" of his property or made in contemplation of the donor's death. —*People* v. *Danks,* 124 N. E. 625.

Inheritance Tax — Clear Value of Property — Deduction of Federal Income Tax. — In connection with the inheritance tax of a New York resident, the court construed the liability of the decedent to federal income tax as affecting the inheritance tax. It was held that the tax was imposed upon the clear value of the estate at the time of death; that at that time no income tax was ascertained; that the tax thereafter paid, upon a return by the executors, could not be considered as a liability existing at the time of death and deductible in reaching the clear value of the estate because the tax so paid was not fixed, it was subject to correction, either reduction or addition, upon examination by the internal revenue department; that a liability thus merely prospective, represented by a tentative tax not definitely fixed and furthermore not payable for a year or more after the death of decedent, was not deductible in ascertaining the value of his estate subject to inheritance tax.— *In re Hazard's Estate,* 177 N. Y. Supp. 369.

Railroads — Valuation — Franchise Value — Special Assessments — Road Improvement Assessment.—The United States supreme court, in upholding a special improvement assessment against a railroad, has made some observations of more than passing importance upon the troublesome question of "franchises" as an element in property valuation. Remarks made by this court in reaching a conclusion in one controversy often throw light upon its probable attitude where similar sets of facts are presented in other controversies. In this case, an improvement act applied only to real estate. A tax under this act was levied on a railroad, based upon its assessment as fixed by the tax commission for general property taxes in making which the "franchises (other than the right to be a corporation)" which were declared to be "property", were required to be "considered". It was urged that by "considering" the franchises the resulting assessment of the railroad tracks, which were real property, was in effect in part an assessment of personal property and hence illegal as made without authority of law, constituting an inequality repugnant to the equal protection clause of the federal constitution.

The court, after suggesting the difficulty inherent in an attempt to value a franchise separate and apart from the "essential properties of corporate existence" if it were to be "considered substantial enough to be of practical value", held that even if it were to be deemed that the tax commission had recognized this distinction, it would amount not to an assessment of a separate valuation of personal property but would merely be a determination of the value of the real property—the tracks—having regard to their use in the conduct of railroad operations, thus giving to such property a value greater as a part of a railroad unit and as a going concern, than it would have if considered only as a quantity of land, buildings and track. The court refers with approval to this method of assessing railroad property sanctioned specifically in *Cleveland &c. R. R. Co.* v. *Backus,* 154 U. S. 439 at 445, where the court developed the principle that value is

dependent upon use and is to be measured by the profitableness of such use; that there is no pecuniary value outside of that which results from use and that it is practically impossible to divide the value of a railroad and determine how much is caused by one use and how much by another; that an apportionment of its total value among separate districts on the basis of length of road in each is probably as good a method as can be devised.

Upon the contention that the improvement constituted no betterment to the railroad, the court refers to the legislative declaration authorizing the inclusion of railroad property and holds that such declaration is conclusive upon the courts under well-settled authority, such as *Spencer* v. *Merchant,* 125 U. S. 345, and the recent cases of *Wagner* v. *Baltimore* and *Houck* v. *Little River Drainage District,* 239 U. S. 207 and 254. Upon a brief reference to the evidence, the court finds it to clearly negative the suggestion that the legislative declaration was arbitrary, capricious or confiscatory and that the railroad would clearly be benefited by the improvement.—*Branson* v. *Bush,* U. S. Sup. Ct., Dec. 22, 1919.

Gross Receipts Taxes—Railroads—Operating Property.—The gross receipts tax on railroads in California was recently under consideration. The state claimed that where a railroad was operating other utilities not specifically included in the constitutional provision as taxable for state purposes by the gross-receipts method, nevertheless the receipts from such other activities must be included notwithstanding that if that were done, the property used in such outside business would be exempt from local taxation.

The court held that no such erratic operation as would follow from such a construction, could be upheld and that the gross receipts from operations other than strictly railroad operations, were not taxable. — *Southern Pac. Co.* v. *Richardson,* 184 Pac. 3.

Capital Stock—Intangible Property —Deduction of Real Estate in Another State. — In a recent case the Arkansas supreme court adheres to its decision in the *Bodcaw Lumber Co.* case, 194 S. W. 692, and refuses to hold that in assessing the intangible value of the capital stock of a domestic corporation, the value of real estate situated in another state should be deducted. It is held that the enactment of Act No. 262, Laws 1917, since the *Bodcaw* case, is not material, as the words "tangible property" appearing in the statutes when that case was decided, would include "real estate", these words appearing in the later enactment. It is held that if the corporation could not deduct its tangible property in another state, it could not deduct its real estate.—*Crossett Lumber Co.* v. *State,* 214 S. W. 43.

Bank Shares — Deducting Real Estate. — In a Utah case it appeared that the assessor had failed to correctly apply the statute respecting deductions, as construed in *Continental National Bank* v. *Naylor,* 179 Pac. 67, as a result of which the shares were alleged to be illegally and erroneously assessed. The court sustained this contention, adhering to its previous construction of the rule which appears to require the deduction for real estate to be not its assessed value but a sum which bears the same relation to the total market value of the shares that the assessed value of the real estate bears to the total book value of the stock surplus and undivided profits.

Upon an application for rehearing, the constitutionality of the statute under which the rule was authorized, was questioned. The question was held to be a serious one but not subject to consideration upon a rehearing.—*Pingree Nat'l Bank of Ogden* v. *Weber County,* 183 Pac. 334.

Corporations — Effect of Invalidation of Charter for Failure to Pay Taxes and of Subsequent Reinstatement. — It was held that where persons dealt with officers of a corporation after its charter had been annulled under a New Jersey act but without the knowledge of such officers and of those dealing with them, and it appeared that the charter was subsequently reinstated, also pursuant to state law, the officers in question could not be held personally liable on contracts made while the charter was inoperative. Circuit Judge Rodgers filed an elaborate dissent.—*Held* v. *Crosthwaite,* 260 Fed. 613.

Debt Limitation — Federal Aid — Public Purpose.—The constitutionality of

an act of Kentucky, passed in connection with the acceptance of the act of Congress providing for cooperative agricultural extension work between agricultural colleges, was questioned. It was held that the act was not violative as not being for a public purpose, although appropriating money for a limited class, or as granting privileges except in consideration of public services.

The objection that the appropriation made pursuant to the act was void as in violation of the constitutional provision limiting the indebtedness which might be incurred by a county, was however sustained.

This action was sought to be sustained upon the theory that the making of an appropriation was not the incurring of indebtedness and that although the indebtedness existing before the appropriation in question, exceeded the constitutional limit, the action in question was not subject to the constitutional inhibition. The court, upon a thorough discussion of the subject, held this argument unsound as in reality proposing a method by which the safeguard could be readily nullified through the indirect method suggested.—*Carman* v. *Hickman County,* 215 S. W. 408.

Recovery — Duress — Limitations as Affecting Non-Residents — Personal Liability of Collector.—An aftermath of the extensive litigation in Massachusetts over the foreign corporation franchise tax, held void in *Int. Paper Co.* v. *Mass.,* 246 U. S. 135, and an illustration of the reward of ingenuity and persistence is seen in connection with attempts of the corporation to recover the tax so held void. The attempt in the state court was abandoned because of the holding of the state court that the failure to begin suit within six months was fatal. Thus the plaintiff was without remedy in the state court and brought suit in the federal court against the state treasurer personally, to recover the tax, which was paid under protest and under claim of implied duress.

The court sustained the contention of duress as warranted by reason of the drastic penalties for non-payment, referring to *Atchison &c. Ry. Co.* v. *O'Connor,* 223 U. S. 280, 286, and other cases which it says make it clear that "unless and except as modified by statute, the common-law right of action for money had and received lies against a tax collector to recover taxes illegally collected, with notice that they are not paid voluntarily, but under protest; duress, express or implied, may make protest unnecessary."

It was held that "no federal court can hold that the rights of foreign corporations or of other citizens of other states to recover money illegally obtained from them, through implied duress of statutes held unconstitutional by the Supreme Court of the United States, shall lie at the mercy of the legislature of Massachusetts or of any other state"; that the defendant treasurer was legally in the wrong and should be remitted to the remedy of an act of the legislature to recover the tax and not the plaintiff, and that the latter was entitled to judgment for the amount of the tax with interest.—*International Paper Co.* v. *Burrill,* 260 Fed. 664. See also Bulletin N. T. A., V, 22.

Recovery—Sufficiency of Protest.—The supreme court of Rhode Island holds that while it is unreasonable to require a taxpayer, as a prerequisite to establishing grounds for recovery of an illegal tax, to become liable for additional costs and expenses imposed as penalties for delay in the event he is unsuccessful and that payment under same form of protest is sufficient, yet that one who merely protests, as evidenced by the receipts of the collector bearing the words "paid under protest," but who does not specify with reasonable certainty the defect or error on which his protest is based, cannot recover back the illegally assessed taxes so paid.

This discussion specifically overrules previous decisions of the court in so far as they held that a protesting taxpayer is not required to state the grounds of his protest.

Incidentally the court also decides that taxes illegally assessed and paid under proper protest can be recovered from the treasurer of a town, even though there be nothing in the record to show that the moneys were paid over by the collector of taxes to the town treasurer. — *Albro.* v. *Kettelle,* 107 Atl. 198.

Fraudulent Assessments — Requisites for Review.—A city assessor, at the suggestion of certain city officials, for the purpose of producing sufficient revenue,

assessed property uniformly at a rate 60% above the assessment of the same property made by the county assessor, but the evidence showed that the increased assessment was not in excess of the fair valuation in the assessor's judgment. The assessment was contested as being illegal because made fraudulently. The court held the evidence insufficient to show fraud and that even it it were to be held that the method used implied fraud, still relief could not be granted, because the taxpayer had not pursued the remedy of appeal to the board of equalization.—*Wible* v. *City of Bakersfield,* 183 Pac. 291.

Relief by Injunction from Illegal Taxes.—In the course of an opinion covering various matters the federal circuit court of appeals had occasion to review generally the decisions upon the situation justifying resort to injunctive relief to resist payment of taxes.—*Camunas* v. *N. Y. P. & S. S. Co.,* 260 Fed. 40 at p. 50.

Situs of Tangible Property—"Omitted" Property.—The question of whether the situs for tax purposes of tobacco stored in a warehouse at Danville, Va., was taxable there or at Richmond, the chief office of the company, was decided in favor of the latter place, following *Union Tanning Co.* v. *Commonwealth,* 96 S. E. 780, it being classed as "intangible" property.

It was further held that where property is not in fact overlooked but, due to a mistake of law as to its class—whether intangible or tangible—it has escaped taxation, such omission does not render it taxable for "omitted" taxes.—*American Tobacco Co.* v. *Richmond; Same* v. *Danville,* 99 S. E. 777.

Omitted Property—Listing by Taxpayer.—It was held that where a taxpayer had fully informed the assessing officer of the extent of his taxable property and the same had been listed by such officer at certain values for several years, the state could not thereafter assess the same property as omitted, under a statute providing therefor, because the same was listed below its true value, the disclosure of the property being a "full disclosure" under the statute which prevented such action, even though the taxpayer placed no values upon the items and though they were assessed below their actual value.—*Loyd Corporation* v. *Commonwealth,* 100 S. E. 833.

Local Taxation by State Laws.—The constitutional limitation in certain states upon the right to impose taxes upon municipalities for local purposes, often raises troublesome questions. In a recent Illinois case a provision of this sort was construed and was held not to prevent the state from imposing by general laws taxes upon municipalities or the inhabitants thereof, which were for the general good of the state, such taxes being held levied not for local purposes but by the state in the exercise of its general powers, through the instrumentalities of agencies created by it.—*St. Hedwig's Industrial School* v. *Cook County,* 124 N. E. 629.

"Assessed Valuation" under Louisiana Tax System.—The effect of the recent system adopted in Louisiana where the valuation for state taxes may be different from that for local purposes, was the subject of recent litigation. A local road district voted bonds which exceeded in the aggregate the limitation, if compared with the "assessed valuation" adopted for local purposes but not if compared with that adopted for state purposes. Action was brought to annul the bond issue because in excess of the legal limit of indebtedness. The court, upon a rehearing of the case, reversed its first holding and ruled that the "assessed valuation" was the actual value fixed as the basis upon which both the state and the localities rely as the constant factor and not the fractional value adopted by the localities to suit their particular needs in a given year.—*Flanigan* v. *Police Jury of Jackson Parish,* 82 So. 722.

Exemptions — What Constitutes "Charity".—An institution deriving its funds mainly from public and private charity, and holding them in trust for the objects and purposes expressed in its charter, does not lose its charitable character and consequent exemption from taxation by reason of the fact that those recipients of its benefit who are able to pay are required to do so, where no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes, and benefits are refused to

none on account of inability to pay therefor. The fundamental doctrine upon which all exemptions from taxation in favor of charitable institutions is based, is "the benefit conferred upon the public by them and the consequent relief to some extent of the burden upon the state to care for and advance the interests of its citizens." It is not the use to be made of profits, but the nature of the business done that is to be considered in deciding the question of liability of property of charitable institutions to taxation.—*Cong. Sunday School & Pub. Soc.* v. *Board of Review,* 125 N. E. 7.

REAL ESTATE — MACHINERY — "CAPITAL". — Felled timber, railroad ties and manufactured lumber constitute "capital" of a company and are properly taxable as such and not as tangible personal property, under the Virginia statute.

Machinery, to be taxed as real estate is such as is so attached to the freehold as to become part of it, and in the absence of stipulations to the contrary, to become the property of the owner of the soil. This was held not the case with respect to portable saw-mills and machinery connected therewith. — *Buchanan County* v. *Ritter Lumber Co.,* 100 S. E. 546.

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Sworn and subscribed before me this 15th day of April, 1920. CHAS. E. LONG.
[SEAL] Notary Public.
(My commission expires Jan. 21, 1923.)

BOOK NOTES

REPORT OF THE ASSESSMENT AND TAXATION COMMISSION CONSTITUTED BY THE EXECUTIVE COUNCIL OF THE PROVINCE OF MANITOBA, 1919. 217 p. with graphs and tables.

This report, recently issued, may be characterized generally as one of the most instructive and most helpful reports issued in recent years. This is so not only because of the treatment in the report proper of the problems which have recently been emphasized, but also because of the elaborate appendices containing a comprehensive and careful description of the interesting and somewhat remarkable experiments in taxation which have been made in Canada, covering matters about which heretofore little accurate information has been obtainable.

Some idea of the scope of the report may be obtained from a cursory description of the topics treated following the order in which they appear in the report.

The report opens with a survey of the assessment situation, the lack of uniformity in the various municipalities and the consequent resultant evils. This suggests the remedy which we have in this country uniformly applied and which this commission unhesitatingly and enthusiastically recommends—the appointment of a tax commission with adequate equipment and authority. The effective arguments for such a commission are submitted, with numerous supporting quotations from American and Canadian experts.

Then follows a chapter on the "Single Tax" so-called, again with reference to observations of our leading economists.

The description of the chaotic situation respecting the fiscal problems affecting the public school system of the province is given, showing no little similarity to similar situations obtaining in certain of our states unencumbered with the complications involved in a multitude of small rural schools conducted with little regard either for efficiency or economy.

The merits of the business tax are discussed, with recommendation of net income as its basis, and the personal income tax is fully endorsed.

The taxation of real property receives exhaustive treatment with reference to capital versus rental value. Capitalization of taxes, shifting of taxes, limiting the

rate, the rentals tax, housing rentals and the increment tax are other subjects of interest.

The labor tax, poll taxes, *in rem* assessments, and local improvement taxes are covered.

A vigorous attack is made upon exemptions, with an interesting recommendation that they be granted, even to churches, only upon local referendum vote.

The equalization of taxes receives a chapter, as does the subject of succession duties, with recommendation for interprovincial agreements as to the latter.

The discussion of the segregation of revenues for provincial use will suggest the similar problem with us.

The recommendations of the commission are contained under 16 separate heads with several subheads, and these recommendations seem to the writer to contain in the main an admirable platform for reform in the province, and for that matter in any state.

The remarkable thing about this report is that it is unanimous although the committee comprises 14 members, representing legislative and administrative officials and one representative from each of the following business groups: grain growers, Board of Trade, Labor Party, Real Estate Exchange, Retail Merchants Association, Manufacturers' Association, with Professor Clark of the University of Manitoba, and a representative of the Union of Municipalities and the Suburban Municipalities. Unanimity in such a group would appear to mean successful attack upon the problems presented.

As indicated above, the historical survey of Canadian taxation is of very great interest. Professor Clark has developed this in various appendices covering the various provinces and indicating as to each the course of events, with frequent reference to the original trend towards the exemption of improvements, and the later steps taken to remedy the havoc which was apparently the uniform result of the earlier practice.

The student and investigator will find in this report interesting facts and data as well as helpful discussion of some of the more difficult recent tax problems.

A. E. H.

THE NATIONAL TAX ASSOCIATION

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OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

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THE THIRTEENTH ANNUAL CONFERENCE

The chief event in the year of the Association will be, as usual, the annual conference. This year we are fortunate in being able to give long-delayed acceptance to the generously repeated invitation extended on behalf of the State of Utah and Salt Lake City to hold our conference in that city, tendered through the Governor of the State at the suggestion of our good friend William Bailey, member and secretary of the State Board of Equalization.

The Executive Committee were unanimous in this choice and a majority favored the week beginning September 6th, practically the only date available, all things considered. We are aware that the time may not be entirely suitable to all, but it is hoped that those who would have preferred another date may be able to accommodate themselves to the date fixed.

The conference this year will therefore be held under most favorable auspices, being "personally conducted" by one of our oldest and most valued members. Mr. Bailey has already been actively canvassing the situation and providing thoroughly for the interest and support of the officials of the state of Utah and of surrounding states. Personal letters detailing the splendid cordiality of the reception which we may expect, have been received from the governors of nine states, they being able to speak from experience, as the Governors' conference was held in Salt Lake City last year.

Members should therefore at once definitely set aside sufficient time to make this conference a part of their annual vacation, because of the extraordinary opportunity it will offer to those who can, in connection with the conference, visit some of the interesting points throughout the region.

Much by way of detail is of course necessary in providing for individual plans, but it may be said in general that the points which would naturally be available for side-trips, either going or returning, are Glacier and Yellowstone Parks and the Grand Canyon. The railroad fare will be arranged so as to permit of the side-trip to the Yellowstone without extra fare. Our friend Edgerton speaks of the wonderful auto-ride between Yellowstone and Glacier Parks, with a stopover at Helena, where he will be on hand to welcome those who can make that trip.

The conference itself is, of course, of

chief importance, and to make this a success it is incumbent upon each member to do something in the way of publicity and to secure the attendance of those who are needed and who would be interested in the work. It is unnecessary at this stage in the life of the Association to speak of the immense value of the conference to tax officials, taxpayers, tax investigators, members of commissions and of legislatures, who are called upon to deal with questions which so largely involve knowledge of the actual effect of statutes and practices in states other than their own. The personal contact between members in casual conversation and in discussion and debate during the sessions of the conference admittedly afford a most valuable experience.

The program will be such as to throw light upon the most recent legislative and administrative experience. There will be an attempt to reach some conclusions upon such vexed questions as income taxation, inheritance taxes, constitutional provisions, federal tax legislation, mine taxation, exemptions, and others of equal importance. There will be a definite effort to secure as full a discussion as possible of the experiences of local assessors, that being beyond doubt one of the most important matters which should claim the attention of the tax student, besides being one of the most interesting. This outline is merely preliminary. It is desired that definite suggestions be made by those who have some special topic to emphasize. Requests made to the secretary will be acted upon so far as possible either in the program or by arranging the discussions.

This preliminary announcement is made to induce and secure attention to this conference on the part of the members, to the end that they will in every available manner seek to secure a representative attendance from their states and the appointment of suitable delegates by the Governor. Further notices will be issued by the secretary as the matter develops. LET EACH MEMBER RESERVE THE DATE AND PLAN ACCORDINGLY.

NOTES AND NEWS ITEMS

Besides providing relief from the "uniform rule" the constitutional convention of **Nebraska** adopted a proposal for a State Tax Commissioner to be appointed by the Governor, to have general jurisdiction over the administration of the revenue laws.

Substantial change was made in the inheritance tax laws of **Ohio** by the recent legislature, through the introduction of a direct inheritance tax administered by local officers, subject however to supervision by the State Tax Commission. Other acts passed provided for bond issues to fund deficiencies in the revenues of municipalities; removed certain interest and sinking fund levies from the limitations on tax rates, upon referendum vote; provided for levies for school purposes through adjustments of existing tax limitations and increased the excise tax on cigarette dealers.

Upon a recent visit the editor made the interesting discovery that our good friend Commissioner Peckinpaugh, of the Ohio Tax Commission, is in the midst of a campaign for nomination as Auditor of State. We are sure that all members will watch his candidacy with interest and wish him success.

We note with especial pleasure the extension of the Tax Commission movement to Canada where by recent enactment of the **Manitoba** Legislative Assembly a commission has been authorized, styled "The Manitoba Tax Commission," appointed by the Lieutenant-Governor-in-Council. The commission is given large powers of supervision and administration, including the appointment of local assessors under certain conditions.

We are particularly pleased to note the appointment as chairman of the commission of our fellow-member, Mr. W. L. Donley, formerly assessment commissioner of Winnipeg, and as another member, Professor Arch B. Clark of the University of Manitoba, also a valued member of this Association.

The **Wisconsin** commission has issued an important circular containing its rulings with respect to certain claims which have been made generally with respect to the income tax.

It rejects the rulings made in New York and Missouri that the salaries of employees of railroads while under federal control were exempt, basing its position upon section 15 of the Federal Control Act (40 Stat. 1918). It yields to the decision of the Supreme Court in the New York case and rules that non-residents must be given the same exemption as residents. It rejects the decision in the federal stock dividend case as authority for exemption of stock dividends as income under the state law, following the Massachusetts ruling.

"LEGALIZED ROBBERY"

From the Los Angeles *Times*

State Comptroller Chambers has written an open letter to Hon. David S. Houston, Secretary of the United States Treasury, making a pertinent protest against the present confusing and unjust system of collecting state and federal inheritance taxes. His arraignment of the present system, leading at times to a quadruple taxation of an estate, is one that should receive serious consideration; for, under the multiple system now practiced, the whole of an estate can be eaten up by the different inhertance taxes. In this relation Mr. Chambers writes:

"The matter of double taxation, first, by a state and, second, by the federal government and, as frequently happens, by several states, thus bringing about treble and even quadruple taxation, is a rank injustice to the estates. In the name of fairness such a situation should be broken up. The confusion now existing and the friction that follows, serves to increase the unpopularity of laws calling for the taxation of inheritances, leads to evasion and in the long run to a very considerable loss of money upon the part of all the taxing powers concerned."

Incomes and inheritances have been seized upon by the politicians, both state and federal, as fruitful sources of tax revenue. As there is nothing in the United States Constitution to forbid duplicate taxation and as each state is permitted to make its own revenue laws, a condition has come to pass in which incomes and inheritances are often taxed out of existence. California levies no tax on incomes, except in the case of public service corporations, but it makes up with one of the highest inheritance tax rates on record. The federal government began taxing inheritances during the war; and there is small prospect that the habit will be abandoned. Under the tax laws of certain states, inheritances in other states can be taxed. The injustice is apparent; but no state is willing to give way to other states or to the federal government and the quadruple taxation continues.

Mr. Chambers suggests that there should be a federal law making for an equitable taxation of inheritances among the different states; and that there should also be separation of estates to be taxed by the federal government and by the different states. He arrives at the conclusion that the United States government should be alone authorized to tax estates valued at more than $10,000,000 and that the state should alone tax estates below the $10,000,000 mark. It is apparent that the states would get the better of that arrangement; but it will be recognized that Mr. Chambers was simply naming a tentative figure to open negotiations.

Some of the inheritance rates in California are ridiculously high; so high that they cause the state to lose revenue. Wealthy persons are chary about establishing a residence here by reason of these excessive inheritance taxes. At the last session of the Legislature Mr. Chambers suggested that some of the rates should be lowered, showing by the experience of the inheritance tax department that the high rates were depriving the state of revenue it would otherwise receive. But the Legislature did not go deep enough into the question to find that a moderate rate, like a moderate tariff, would produce much more revenue than a prohibitive rate. So the high rates still stand, costing the state about $1,000,000 annually and keeping people of means away from California.

Piling the federal inheritance taxes on top of the taxes levied by the states is rank injustice. It is time for the different state governments to take the question up and hold some kind of conference for the purpose of securing an adjustment between the states and the federal government. A continuation of the present plan is little short of downright robbery.

A PERPLEXED ASSESSOR

THE "CORPORATE NONENTITY" AGAIN

F. N. FLETCHER
Secretary of the Nevada Tax Commission

The differences between individual and corporate existence, in law and in fact, are nowhere more strikingly contrasted than in the processes of taxation. The original intent of legal incorporation was to create a thing or person which would have the same legal rights and privileges as a human being, no more, no less. The purpose was good, and in the main so have been the results. But it is one thing to legislate a non-sentient, inhuman being into a legally human being, and another thing to keep it human. Tax assessors sometimes meet these legal Frankensteins and are puzzled at their human appearances and inhuman attributes. If the corporate existence is simple and self-contained the assessor has little difficulty with it, in fact finds it a rather agreeable, not to say profitable, subject; but when it not only possesses itself but also possesses portions or even the whole of other like existences the assessor naturally seeks advice. Smith may not own anything owned by Brown, but Smith Incorporated may own half or all of Brown Incorporated, even if Brown Incorporated owns a part of Smith Incorporated. The following not wholly imaginary correspondence may serve to elucidate the perplexities surrounding the official life of the modern tax assessor.

OFFICE OF
COUNTY ASSESSOR

THE STATE TAX COMMISSION,

Gentlemen:

A question has come up in my work of assessing property for taxes in this county on which I desire your advice. While appraising the various properties in this county I came to the office of Smith Incorporated, a private bank. With the assistance of the officials I learned that the capital, surplus, and undivided profits of the bank amounted to $90,000. In addition the bank owned 10,000 shares of Brown Incorporated worth one dollar per share. The total valuation of Smith Incorporated was placed on the rolls at $100,000. Later I went to Brown Incorporated, a soap factory. This property and holdings had a fair market value of $150,000, including 50,000 shares of Jones Incorporated worth $50,000. It was listed at $150,000. Next I called on Jones Incorporated, owner of a private car line, and had no difficulty in coming to agreement with the officials in charge that the market value of this company was $80,000, including 600 shares of Smith Incorporated worth $100 per share; and the company was listed at that figure. The three corporations therefore were assessed at a total of $330,000. Not being an expert in appraising the values of corporations I asked and received the aid of the respective officials, and they had agreed with me, or I with them, as to the final figures placed on the rolls. I am satisfied that neither of the corporations could be purchased for a dollar less than the assessed valuation, and my inclination was to add about twenty per cent to the valuations on general principles. Imagine my surprise on receiving the enclosed letter from Messrs. Seek & Find, who, it appears, owing to the interlocking nature of the directorates of the three corporations, act as attorneys for the bunch. I desire to be perfectly fair in this matter, and about half of the voters in the county live in the soap factory precinct. Kindly advise.

Respectfully,

JOHN SIMPLEX,
Assessor.

OFFICE OF
SEEK & FIND
COUNSELLORS AT LAW

HON. JOHN SIMPLEX,
Assessor Adams County.

Dear Sir:

Your attention is called to the assessed valuations of certain corporations in this county which valuations if not corrected will result in most unjust double taxation. In fixing the assessed valuation of Smith Inc. you have appraised the same at $100,000 which includes 10,000 shares of Brown Inc. appraised at $1.00 per share. If this portion of Brown Inc. is assessed to Smith Inc., whose legal ownership thereof is not disputed, the same portion of valuation cannot again be assessed to Brown Inc. without inequitable, illegal, and unwarranted double taxation on that particular portion of property. Again it appears that Brown Inc. is assessed at $150,000, which includes not only the $10,000 already assessed to Smith Inc. but also 50,000 shares of the capital stock of Jones Inc. appraised at $50,000. While the ownership of this stock by Brown Inc. is acknowledged, inequity results from the fact that having already assessed the same to Brown Inc. you also include it in the valuation of $80,000 assessed to Jones Inc. Your attention is further directed to the fact that in assessing Jones Inc. at $80,000 you include not only the $50,000 already assessed to Brown Inc. but also the 600 shares of Smith Inc. already assessed to the latter company. It is quite true that Smith Inc. is the owner of property and franchises worth $100,000; and that Brown Inc. has a valuation, as a corporation, of not less than $150,000; and that Jones Inc. could not be purchased for less than $80,000; but it is at the same time clear that the property and franchises owned by these three corporations do not have a total valuation equivalent to the sum total of the valuations of each. To explain the situation it will be necessary to go into the history of the organizations. Brown Inc. was incorporated to manufacture soap. It soon found itself handicapped at times by lack of cars in which to transport its products; it therefore purchased an interest in a private car line operating under the name of Jones Inc. As the business grew its necessities demanded at times large sums of money, at other times but little; in other words, a flexible capital was required. To meet this situation a private bank was organized under the name of Smith Inc., one half the stock of which was subscribed for by Jones Inc., for special reasons. At present Brown Inc. has a plant and business worth $100,000 exclusive of its holdings in Jones Inc.; and Jones Inc. has property worth $20,000 exclusive of its holdings in Smith Inc.; and Smith Inc. as a banking institution is fairly worth $90,000 exclusive of its 10,000 shares in Brown Inc. As a practical business man you can readily see that the three corporations can be equitably assessed only on the basis of the valuations just set forth, amounting to $210,000 instead of $330,000 as you have them listed. As a public official sworn to assess all property at its fair market value you will naturally ask how a corporation can be legally assessed for less than its stock is worth. How can Brown Inc., which could not be bought for less than $150,000, be assessed for $100,000 without injustice to other property owners? And so as to Smith Inc., and Jones Inc. Let us analyze the situation. Suppose you desired to purchase the entire holdings of the three corporations, how much would you pay for the aggregation? Well worth the market price, you say. Very well, how much money will you require to complete the transactions on a cash basis? You approach Smith Inc. whose market value is $100,000, and you pay that price. As sole owner of the bank you go to Brown Inc. and purchase the business for its market value of $150,000; and to Jones Inc. and purchase it for $80,000. You have paid out $330,000 in cash, just the amount you have assessed the three corporations for on the tax rolls. But what did the properties actually cost you? When you paid $100,000 for Smith Inc. you placed $60,000 in cash in the treasury of Jones Inc., the owner of 600 shares of Smith Inc.; when you purchased Brown Inc. at $150,000 you placed $10,000 in cash in the treasury of the bank which owned 10,000 shares of Brown Inc.; and when you purchased Jones Inc. for $80,000 you placed in the treasury of Brown Inc. the sum of $50,000. The net result to you then is this: you have purchased and are the sole owner of the three properties, in-

cluding franchises and good-will, for which you nominally paid out $330,000 but actually paid only $210,000, for with the properties you received cash paid to yourself $120,000, this part of the transactions consisting solely of swapping dollars. By securing options on the three concerns you could have arranged with any bank to secure titles to them by depositing with the bank $210,000 in cash. If the properties cost you only $210,000, how can you equitably assess them to the corporations at a valuation higher by $120,000?

That our conclusion, as above set forth, is good law as well as good sense is disclosed in a recent decision of the Supreme Court of the United States in the case of *The Bank of California v. Richardson*. The bank owned stock in another bank, and was assessed for the value of its holdings in the latter bank along with other stockholders; but the stockholders of the Bank of California were also assessed for the same stock, the Assessor having included its value in the value of their stock in the Bank of California. The Court held that the stock of the second bank having already been assessed to the Bank of California could not again be assessed to the stockholders of the latter bank, but must be deducted from the market value of the latter bank's stock before the proper assessable value of this stock could be determined. There was, to be sure, a dissenting opinion which held that under the wording of the law the stock in question could legally be assessed to the bank owning it, and again assessed to the stockholders of the owning bank as a part of the bank's assets; but the practical result of such a process would be that that portion of the second bank's stock owned by the Bank of California would be twice taxed while the balance of the same stock would be taxed but once, plainly an absurd proceeding in practice however correct in law.

Awaiting your favorable action in the matter above set forth, we beg to remain,

Very truly yours,

SEEK & FIND.

THE MEMORANDA OF THE BRITISH BOARD OF INLAND REVENUE ON THE SUBJECT OF A WAR LEVY

ALZADA COMSTOCK
Mount Holyoke College

The proposal to tax war wealth in Great Britain is gaining momentum. When the Select Committee of the House of Commons on War Increases in Wealth began its sittings in the middle of February, the Chancellor of the Exchequer indicated to the Committee the fact that he would not be averse to the recommendation of the tax for the purpose of reducing debt, and announced the preparation for the Committee of a report on the practicability of the tax by the Board of Inland Revenue. The conclusion presented by the Board of Inland Revenue proved to be, in short, that although the problem of the taxation of war-time increases in wealth "transcends in difficulty any previous effort of taxation" in the country, the plan formulated by them would, in their judgment, be effective.

The report by the Board of Inland Revenue, known as the *Memoranda on Suggested Taxation of War-time Increases in Wealth* (Cmd. 594, 1920) is the result of inquiries undertaken by the Board at the Chancellor's request a year ago. During the discussions of the Budget of 1919 the Chancellor asked the Board of Inland Revenue to give serious attention, as soon as the pressure of work on the Budget had passed, to the proposal for a levy on war increases of wealth, and to report to him as soon as their inquiries had reached a sufficiently advanced stage. The Board accordingly began its inquiry into the subject in the summer of 1919. During the financial debates in the House of Commons in the autumn, the Chancellor came to the conclusion that so important a step as either the refusal or the passage of a

measure of this kind would be unlikely to meet with anything like general acceptance by the country if the decision rested on the private inquiries of the Government alone, and unless the public were fully informed concerning the arguments advanced for and against the tax, the severe administrative measures necessary, and the large executive powers involved. Accordingly he suggested the appointment of a Select Committee to consider the subject, a proposal which was acted upon favorably. The preliminary work of the Board of Inland Revenue, which had prepared memoranda during the autumn, was given provisional approval by the Chancellor, pending the organization of the Select Committee, and the Board was instructed to continue its inquiries. Upon the actual organization of the Committee the results of the Board's inquiries were presented to them, in the form of a *Memoranda*. The report contains exactly the same kind of detailed information which would have been prepared for the Chancellor of the Exchequer himself, and consists in part of the material prepared for his use.

The conclusion regarding the probable success of a carefully planned tax is set forth in *Memorandum I* of the series, which deals with the practicability of the tax and the form which such a duty might take. In the same section of the report the Board disclaims any intention of discussing the *desirability* of imposing a duty on war-time wealth, or of dealing with questions of principle except so far as is necessary in discussing the practicability and possible form of the measure. The levying of a duty exclusively on "war profits", as generally conceived, or, in fact, on any single one of the different types of increases of wealth during the war period, is regarded by the Board as impracticable, following the conclusion of Mr. J. A. Hobson in his recent book on "Taxation in the New State." The Board believes that the best method of approach to the problem is to consider the aggregate wealth of individuals at the present time as compared with their pre-war wealth, and after making the desirable allowances, to levy a duty upon the balance of the increase shown. Such a duty should primarily be charged upon individuals, and should start from a comparison of values of (say) June 30, 1914 and June 30, 1919. The proceeds of the duty should be specially earmarked for the redemption of debt. It is suggested that the duty should be known as the "War Levy".

The Board recommends the aggregation of the increases of wealth of husband and wife for the purpose of determining the rate of the tax. In addition to allowances for children, allowances should be made in recognition of special efforts to economize and save money in furtherance of the war. The lump-sum method of payment should be combined with the instalment method. The obligation to give notice of liability should rest upon the taxpayer, and penalties for evasion should be drastic.

In *Memorandum II* the increase of wealth in the hands of individuals is estimated, the possible methods of graduation are described, and the probable yield of the duties is shown. Using as a basis Dr. J. C. Stamp's estimate of £11,000,000,000 as the money value of the property in the hands of individuals just before the outbreak of the war, the Board of Inland Revenue estimates the increases of value appertaining to individuals on June 30, 1919, as slightly more than £4,000,000,000. Increases in the value of furniture and other non-income-bearing assets are not included in this amount. The numbers of individuals whose wealth has increased during the period is 340,000, but in the case of 146,500 of these individuals the increases did not exceed £5,000. The exemption limit should be set at this point.

The Board is of the opinion that the principle of graduation, based on the relative ability of the taxpayer to pay, a principle already in force for the income tax and the estate duty, will command more general acceptance than a uniform rate.

Graduation may be effected from an "absolute" or from a "relative" point of view. From the "absolute" point of view, it might be provided that the rate should be 40 per cent where the increase of capital does not exceed £50,000, and 60 per cent when the increase of capital passes beyond this limit. According to the alternative or "relative" method, it might be provided that the rate of duty should be 40 per cent when the increase of capital does not exceed 50 per cent of the taxpayer's pre-war capital, and 60 per cent when the increase of capital exceeds this ratio; these basic rates of duty to be in-

creased to 45 and 65 per cent respectively when the total pre-war resources of the taxpayer exceeded £200,000, and to still higher percentages for correspondingly higher amounts. The estimated yield is £900,000,000 for a tax levied according to the first method and £1,000,000,000 for a tax levied according to the second.

Memorandum III contains suggestions regarding the treatment, for the purposes of a duty on war-time wealth, of wealth which has devolved on death since the appointed pre-war date. The Board suggests that successors should be required to include in their capital at the appointed post-war day that capital which they had inherited since the appointed pre-war day, but that they should be allowed to add to their capital at the pre-war day *so much of the value of the inheritance as they can show to have represented its value at that date.*

Memorandum IV is devoted to the treatment of limited interests, the valuation of which adds greatly to the complexity of the duty. The valuation of a limited interest under a settlement involves two questions: the determination of the value of the settled property or the income it will produce, and the extent of the share of any particular beneficiary. The whole problem is of a character so unfamiliar to many taxpayers that the resources of the Board should be freely extended to them, for the purpose of giving assistance and advice in the rendering of returns. At this point (page 38 of the *Memoranda*) the Board makes the following observation:

> Criticism is often heard of the complexity of tax legislation. That complexity, it is suggested, is due far less to over-elaboration of the general conceptions underlying the taxes of this country, than to the effort to fit conceptions, simple in themselves, to the complex conditions of modern social organization. Owing to the forms which [illegible] modern society [illegible] assumes, and to the problems which the valuation of capital presents, this difficulty (which is felt in varying degrees in regard to all taxes) probably reaches its height in the case of a non-recurring tax charged at a high rate by reference to capital valuations.

Memorandum V deals with the place of public companies in a duty on war-time wealth. No difficulty is to be expected in arriving at the market value of shares on either of the appointed dates. It has been pointed out, however, that the aggregate market value of the shares may not always represent the real value of a business as a going concern, and that consequently the war-time increase may not be fully revealed in the returns of the individual shareholders. It is the conclusion of the Board that any attempt to arrive precisely at such "unrevealed value" of a company's assets from a study of the balance sheet is in most cases foredoomed to failure, and that an attempt to reach this "unrevealed value" through taxation is a task too difficult to be attempted.

The work of the Board of Inland Revenue with respect to the projected war levy is not yet finished. The Select Committee at its later meetings has heard in detail from representatives of the Board the explanation of the Board's computations and its further suggestions for the valuation of public companies. At the same time the Board is continuing its own work on the plan. Through the working-out of a practical method of application in this way, by skilled and experienced officials, the project of a levy on war wealth is receiving substantial and influential support. Furthermore, the presentation of the *Memoranda* has lightened many of the more onerous tasks of the Select Committee. There still remain before the Committee the duties with which it was charged by the Chancellor of the Exchequer in February, that of making a preliminary report by budget-time, and that of subsequently preparing a bill embodying its conclusions.

SOME CAUSES OF GROWING TAX RATES

J. G. ARMSON
Chairman, Minnesota Tax Commission

An address before the Minnesota Tax Conference

The subject assigned me, "Some causes of growing tax rates," offers a wide field for discussion, but because of the limited time allotted me, I can only refer to a few of the principal causes that have contributed to the great increase in tax burdens during the past two or three years.

While it is my intention to confine my remarks chiefly to the increase in state taxation—and by state taxation I mean all taxes levied in the state, whether levied by the state or by the minor subdivisions of the state—it is necessary to refer briefly to federal taxation, because of the indirect, but nevertheless important bearing it has on state taxation.

It is not necessary to say to this intelligent audience that all public revenues must come from the pockets of the people in some form of taxation. Governments have no magic fund out of which, by a wave of the wand, they may secure public revenues. The cost of every public activity must be paid by the people, either through direct or indirect taxes. Taxation in some form is therefore the sole source of public revenues.

Of course we sometimes delude ourselves with the thought that by resorting to certain forms of indirect taxation we avoid the burden. But this delusion is readily dispelled if we but stop to consider that practically all indirect taxes are passed on to the ultimate consumer, and that the person who pays them in the first instance is simply the collector and not the bearer of the tax. Perhaps this would not be so objectionable if the collector turned over all of the increase in the price of labor or commodity that he collects from the people because of the tax. But generally he not only passes the tax along to the people but adds a considerable amount to it for personal compensation by adding to the price of the thing taxed. While people pay indirect taxes with less complaint than direct taxes, yet generally speaking, the indirect method of taxation is much more costly to the people than the direct method of taxation.

Prior to the World War the revenues of the federal government were derived mainly from import duties and from so-called internal revenue taxes. Upon the entry of the United States into the war, however, it was found that the revenues derived from these sources were entirely inadequate to meet both ordinary expenses and war expenses. It therefore became necessary to resort to other methods of raising money. The issuing of bonds offered the most immediate relief, but it was deemed advisable to provide for a part of the war costs by taxation, and in order to do this, not only was it necessary to increase tax rates on many existing objects of taxation, but new objects of taxation had to be selected. From this necessity came the surtax on incomes, the so-called excess profits tax, the tax on transportation, the tax on certain privileges and occupations, and numerous other emergency taxes, all of which of course came from the pockets of the people.

As showing the growth in federal expenditures, let us compare the years 1900, 1910, and the anticipated expenditures of 1920. In 1900 the total appropriations amounted to $585,033,000, being a per-capita cost to the people of $5.00. A considerable part of the cost of the Spanish-American war was included in the appropriation of that year.

By 1910 the congressional appropriations had grown to $793,834,000, or a per capita of about $7.75; and even five years later, in 1915, the per-capita tax had grown to only $8.00.

For the present year, or rather for the year ending June 30th, 1921, the estimated expenditures, compiled by the experts of the treasury department, are given at $3,973,787,000, which will represent a per-capita expenditure of approximately $36, or six times greater than the per-capita cost for the year 1900.

A considerable part, approximately $1,300,000,000, of this increase, represents interest and sinking fund charges on the nation's public debt. The gross public

debt of the United States today is slightly in excess of $26,200,000,000, of which amount nearly $25,000,000,000 has been incurred since April 6th, 1917. It is but fair to say, however, that loans to the allies and other European countries represent about 40 per cent of our gross indebtedness.

The enormous increase in federal expenditures due to the war, and the war itself, have both had an indirect but none the less important effect on state and local taxation. Keeping in mind that in the final analysis all taxes are paid by the people, it will be readily conceded that the increase in federal taxation necessarily took more money from the pockets of the people. This increased demand on the private purse made it necessary to increase the price of labor and commodity to meet this demand, and naturally resulted in an increased price level.

The second, and not less important bearing the war had on the price level was the withdrawal of several million men from productive pursuits, thus lessening production. This lessening of production resulted in an increase in the price level due to the economic law of supply and demand.

The increased price level due to these and other causes made it necessary to increase state and local taxation in order to meet the increased cost of labor and commodities, hence the indirect bearing the war has had on the increase in state and local taxation.

In comparing the taxes of one year with those of some other year, it should be kept in mind that an increase may be nominal rather than real. Because the *amount* of taxes in one year is greater than the *amount* levied in some other year, it does not necessarily follow that the tax burden is greater. The changing price level of labor or of commodity may offset an increase or a decrease in the *amount* of the tax. The burden of the tax is not measured by its amount as expressed in dollars and cents; it is measured rather by the amount of labor or of commodity required to pay the tax.

After all, money is not wealth, nor does it measure wealth except relatively. It is but a convenient medium for the exchange of wealth. Money in itself will not sustain life; it cannot be used for food or for clothing. It has value only because it can be exchanged for the things that sustain life—for food and clothing, for service and for other things that add to the comfort and enjoyment of life.

Being a medium of exchange, the value of the dollar fluctuates, that is, its purchasing power changes; it rises when there is an oversupply of labor or of commodities, and falls when there is a scarcity of labor or commodities. There have been times in recent years when a dollar could be exchanged for a day's labor of a certain kind, or for a bushel of wheat, and other times when its exchange value would only buy a half day's labor or a half bushel of wheat.

Now, let us consider very briefly how the exchange value of the dollar affects the amount of taxes that may be levied at two different periods. For this purpose let us compare the total taxes levied for all purposes in this state in the years 1913 and 1918, and the purchasing power of the dollar measured by its exchange value for certain commodities in the same years.

In 1913 the total taxes levied on the general property of the state amounted to $45,763,382; in 1918 the levy had grown to $68,507,528, being an increase in the five-year period of almost 50 per cent. To meet this increase the man whose taxes amounted to $100 in 1913 would have to pay $150 in 1918.

Now, measured in dollars, there was an apparent increase of 50 per cent in taxes in 1918 over 1913, but when the purchasing power of the dollar for certain commodities is considered we find that the burden of the tax had not increased, and in some cases the burden had actually decreased.

Using the average price of certain commodities received by producers in 1913 and 1918 as tabulated by the department of agriculture at Washington, we find that it required 131 bushels of wheat to pay a tax of $100 in 1913, while in 1918, 74 bushels paid the taxes of $150. In 1913 it required 204 bushels of corn to pay a tax of $100, while in 1918, 111 bushels paid the tax of $150. It required 310 bushels of oats to pay the tax of $100 in 1913, and only 203 bushels to pay the $150 tax in 1913. In 1913 it took 200 bushels of barley to pay the tax of $100; in 1918, 118 bushels paid the tax of $150.

The difference was just as great in rye—not the liquid kind. In 1913 it required 157 bushels of rye to meet the tax of $100, while in 1918, 88 bushels paid the tax of $150. Not being endowed with prophetic vision, I would not care to hazard a guess on the taxpaying value of barley and rye in the future, now that national prohibition is in effect.

In live stock for food purposes the story is much the same as in grain. In 1913 it required 1852 pounds of beef cattle to pay the tax of $100, while the tax of $150 in 1918 could be paid with 1800 pounds. The price level on hogs—the animal kind—shows a still greater change. It required 1477 pounds of hogs to pay the tax in 1913 of $100, while in 1918 the tax of $150 could be paid with 983 pounds. It required 2300 pounds of sheep to pay the tax of $100 in 1913, while in 1918 it only required 1422 pounds to pay the tax of $150. And the wool from the sheep shows a still greater difference, for in 1913 it took 537 pounds of wool to pay $100, while in 1918 it only required 258 pounds to pay the tax of $150.

The tax of 1913 used up the value of 146 bushels of potatoes, and only 124 bushels in 1918. It took 387 pounds of butter to pay the tax in 1913, while 348 pounds paid it in 1918. In 1913 it required 373 dozen eggs to pay the tax of $100, while the tax of $150 in 1918 could be paid with 348 dozen.

Applying the same test to labor, we find that in 1913 it would require 448 hours of labor at the average wages paid factory workers in that year, to pay a tax of $100, while in 1918 the tax of $150 could be paid by 344 hours of labor.

Similar comparisons could be made with practically all lines of manufactured products, and would show that if taxes were paid in such products rather than in money, the quantity required in 1918 to discharge the tax obligations of that year would be less than the quantity required to discharge the tax obligations of 1913.

It will be conceded of course that the figures given above do not in themselves prove that the tax burden was not greater in 1918 than in 1913. They simply show that owing to the change in price level in the two periods compared, if taxes could be paid in kind, that is, in products, the quantity required to pay the tax in 1918 would have been less than the quantity required in 1913. If the costs, however, that enter into production are considered, it would probably be found that the actual tax burden was materially greater in 1918 than in 1913.

While state taxes have been growing at a rapid pace in recent years, so also have the taxes of the minor subdivisions of the state. The prevailing high tax rates, therefore, are not chargeable to any one unit of government. Every subdivision of our government—the school districts, the townships, the cities and villages, the counties, and the state and federal governments—have joined in the grand procession for more and more public revenue. How long the procession will continue I cannot say, but already the over-burdened taxpayers are beginning to ask, How long, O Lord, how long?

And now in conclusion let me say that while I have endeavored to explain some of the causes of growing tax rates, I do not wish to be understood as either justifying or condemning the increases. Public expenditures are under the absolute control of the people. They can be increased or decreased as a majority of the people will. Every increase in expenditures means increased taxation, while a decrease in expenditures means decreased taxation. How far they may be still increased without becoming so burdensome as to retard the development of the state is a question for the people to determine. Whether they can be materially reduced without impairing the efficiency of government and the proper development of the state is also a question for public determination.

Whatever our individual opinions may be as to either of these questions, the fact remains that taxes have been growing at an alarming rate in recent years, and we may well pause to ask whether it would not be prudent to call a halt before they become oppressive.

COLLECTION OF STATE INCOME TAXES FROM NON-RESIDENTS

WALTER N. SELIGSBERG
New York City

The collection of any taxes from non-residents is a proceeding fraught with many difficulties resulting from the constitutional limitation of the taxing power. In this paper we shall not endeavor to cover the whole field, but shall limit our discussion to the collection of income taxes from non-resident individuals and partnerships, and to their collection by the states, and shall not discuss problems affecting the federal income tax nor, except as the discussion may be necessarily involved, the collection of state income taxes from non-resident corporations. The reasons for limiting the discussion are that the problem of collecting income taxes from non-resident individuals and partnerships is particularly pressing; that the federal government is not hampered by some of the constitutional limitations laid upon the state governments, and that there are certain special methods of collecting from non-resident corporations by way of annual license taxes, which cannot be extended to individuals or partnerships.

The limitations upon the states' power to tax have been clearly set forth in an opinion by Mr. Justice Peckham, in *Dewey* v. *Des Moines*, 173 U. S. 193, as follows:

"The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax. . . . All subjects over which the sovereign power of the state exists are objects of taxation. . . . The power of the state to tax extends to all objects within the sovereignty of the state. . . . The power to tax is, however, limited to persons, property and business within the state and it cannot reach the person of a non-resident. . . .

This case has been followed and is the law of the land and the net result of its decision is that the property of a non-resident within the state is subject to assessment, but the tax can only be collected out of that property. It is all very well if the property is real estate, but in commercial communities in which tax problems are most acute, stocks of goods are constantly changing, and it is rare that personal property of a non-resident in his possession on the day of the assessment remains in his possession when the tax is due, or at the later date when it becomes delinquent and must be collected; and yet, the states' power to tax and to collect the tax has, up to date, been limited to the property physically within the state on the assessment date and on the due date.

Attempts by states and municipalities to collect taxes from non-residents personally have failed because there is no personal obligation. *City of New York* v. *McLean*, 170 N. Y. 374; *N. Y. Milk Products Co.* v. *Damon*, 57 App. Div. 261, 172 N. Y. 661; *State of Maryland* v. *Turner*, 75 Misc. 9.

In a very recent case (*Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y. 227, 233), the New York Court of Appeals said with respect to an assessment against a foreign corporation and an attempt to ascertain what its property was by examination of its officers under oath:

"The assessment against the Lobsitz Mills Company in form was as provided by the statute a personal assessment, but it was in fact an assessment *in rem*—the thing assessed being the capital so invested in business in said city. The tax upon such assessment did not become a debt. It did not create a personal liability but subjected the capital of the corporation employed in business in the city of New York at the time of the assessment to liability for the tax. . . . An action as for debt against a corporation could not be sustained to collect the tax. . . .

"The state may provide for the sale of the property upon which the assessment is made but it cannot under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident so far as his personal property is concerned, would amount to the taking of property without due process of law and would be a violation of the Federal Constitution. . . ."

This limitation was expressed as follows in the very latest decision of the United States Supreme Court in the Oklahoma income tax case, *Shaffer* v. *Carter*, unreported case decided March 1, 1920:

"The entire jurisdiction of the state over appellant's property and business and the income that

he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem;* . . . ."

that is to say, the states have jurisdiction over the property but not over the person of non-residents.

The jurisdiction has not only been limited to property, but it has been suggested that the only property subject to lien and levy for income tax is the very property producing the income. In Justice Pitney's opinion in the Oklahoma case there appears a statement of this contention, the Court, however, holding that the point did not require discussion in that case, viz.:

"the state is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for income tax may not be imposed upon a non-resident's unproductive property nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it."

The foregoing quotation substantially states the law as developed to date.

To illustrate this point: It would be contended that if a bond dealer lived in Connecticut and did business in New York, and on the assessment day, October 1st, had $1000 worth of railroad bonds, and $1000 worth of industrial bonds which yielded an annual income of $60 each, and if, when the tax became due, he had disposed of either of these properties, then the tax on the $120 income could not be collected from the remaining property, but only the portion of the tax on the income derived from that property.

Justice Pitney held that the question thus stated was not raised in the Oklahoma case but the facts come very close to the supposed facts. In that case it appears that all of plaintiff's property in the state of Oklahoma consisted of oil-producing land and oil and gas leaseholds and property used in producing gas and oil; that he was engaged in the business of developing and operating properties for the production of oil; that his entire business, inside and outside of Oklahoma, was managed as one business, and his entire net income in Oklahoma for the year was derived from that business. It did not appear, although the Court deemed it probable, that there were changes in the corpus of the property arising from purchases, new leases, sales, expirations, etc. Nevertheless, the Court held that the lien created by the Oklahoma law was valid for the following reasons:

". . . it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed. The entire jurisdiction of the State over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem;* and we are clear that the State acted within its lawful power in treating his property interests and business as having both unity and continuity. . . . The State did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business."

This decision is the last word on the subject, and it throws a little beam of light into the dark problem of what can be done to collect income taxes from non-residents, for it implies—although it does not hold so in so many words — that to the extent that property represents capital invested in the business, the mere fact of a change in the corpus of the property will not relieve the property as a whole from a lien. How then to create this lien is the problem.

In the first place, income taxes are direct taxes upon the property from which the income proceeds. *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 158 U. S. 601.

In the stock dividend case of *Eisner* v. *Macomber,* unreported, decided March 8, 1920, it is held, confirming the earlier case, that

"tax upon loss and profits of real estate and upon returns from investments of personal property were, in fact, direct taxes upon the property from which such income arose, imposed by reason of ownership. . . ."

It is therefore not alone the income itself, but the property from which it is derived, which is subject to the juristiction of the state. Now, in describing that property, all of the cases use expressions which require a certain amount of definition.

Dewey v. *Des Moines,* refers to the power to tax as covering "business done within the state." The New York Court of Appeals, in the *Maltbie* case, refers to the subject of taxation as "the capital of the corporation employed in business"; and in the Oklahoma case the tax is sustained as a tax upon incomes accruing to non-residents "from their property or business within the state." In other cases,

at various times, the Supreme Court has decided (*Burke* v. *Wells*, 208 U. S. 14) that "capital invested in business in a state" and "capital employed in business in a state" (*Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395) are subject to taxation.

It is common knowledge that capital employed in business is neither a fixed quantity nor quality. It is not like a lot of land or package of bonds, but it is the sum of all property used or employed in a business.

The bond dealer who has a $1000 bond on the assessment day and changes it into another $1000 bond before the tax day, has not disposed of his capital; he has simply altered its form. His capital account upon his books remains the same. The grocer who has a hundred pounds of coffee on the assessment day and fifty pounds of tea, and on the tax day has a hundred pounds of tea and fifty pounds of coffee, has not disposed of his capital; he has simply altered its form.

If, then, capital invested or employed in business by non-residents is subject to the tax, the matter of collection becomes very much simplified, because the tax collectors will no longer be limited to the particular item or particular property theory of collection.

In the Oklahoma case, Justice Pitney indicates that unity and continuity are, if not all of the elements, at least two of the criteria by which the existence of business capital may be determined. It is worth some effort to determine whether from any adjudged cases we can learn what capital employed in business is, and if a law can be framed creating a lien upon business capital or upon capital employed in producing income, general enough in definition to permit practically of collection.

We derive a good deal of help in this inquiry from an examination of the New York franchise tax cases which impose a franchise tax on domestic and foreign corporations, measured by the capital employed within the state. The wording of the statute refers to capital stock, but this has been defined as meaning capital.

In a very recent case the Court of Appeals (222 N. Y. 545) affirmed, without opinion, a decision that capital employed in business by a foreign corporation meant the corporation's gross assets within the state. See *People ex rel. Standard Oil Co.* v. *Saxe*, 179 App. Div. 721. In an earlier case, "capital stock" defined as "capital" was declared to be measurable by the "actual value of property whether in money, goods or other tangible things" within the state. *People ex rel. Seth Thomas Clock Co.* v. *Wemple*, 133 N. Y. 323. In another case it was held that the capital was measured by "the actual value of its property within this State whether in money, goods or other tangible things. . . ." *People ex rel. New England Loan & Tr. Co.* v. *Roberts*, 25 App. Div. 16, 156 N. Y. 688. The Court held that in arriving at the amount of capital employed during a year, the average amount should be taken and that even amounts paid out within the jurisdiction for salaries might be considered.

It is perfectly apparent, therefore, that the Courts can and will, whenever necessary, ascertain what capital has been employed in business in a state.

From the foregoing decisions, it is also quite clear that capital employed in business is, for tax purposes, measured by the average amount of the gross assets employed in the business during a period, and that it consists of gross and not net assets, and that at any given moment it consists of gross assets. It is also reasonably clear from Mr. Justice Pitney's opinion in the Oklahoma income tax case that what he defines as property interests which were the source of the income, is nothing more nor less than capital employed in business in the state and that upon such capital of a non-resident the state can create a lien. We see no reason, therefore, why, without further definition, the tax laws cannot be made to provide that the amount of the tax as finally determined shall be a lien upon the capital employed within the state by residents and non-residents, and we believe that a levy could be made under such a provision to enforce such a lien against the gross assets of non-residents to the extent that they represented a continuous and unified investment in business within the jurisdiction. We foresee very few practical difficulties with respect to substantial taxpayers in establishing such unity and continuity, and we believe that the probability of good results from such provision justifies its inclusion in the tax laws.

THE JUDICIAL DEBATE ON THE TAXABILITY OF STOCK DIVIDENDS AS INCOME

EISNER *v.* MACOMBER

THOMAS REED POWELL

The question whether a stock dividend is income or capital to the recipient has arisen in four ways. Does such a dividend belong to the life tenant or to the remainderman in a trust of which the capital must be kept intact for the remainderman? Is a stock dividend "income" within the meaning of that word in a statute? May Congress impose a tax on stock dividends where its particular exercise of power must be justified by the Sixteenth Amendment which in terms applies only to taxes on incomes. Are stock dividends taxable as income by a state legislature whose power depends upon the scope of "income" in an amendment to the state constitution? To a plain man it might seem that these four questions are really only one question. Is a stock dividend income or is it not? When this is answered, what is there left but to apply our "yes" or "no" to each and every case?

But the matter is not as simple as that. This is apparent from the varied answers which the courts have given to the several questions that have arisen. The Supreme Judicial Court of Massachusetts tells us that the state constitutional amendment authorizing a tax on income applies to a stock dividend.[1] Judge A. N. Hand of the Federal District Court for the Southern District of New York holds that stock dividends are income within the meaning of that word in an Act of Congress and in the Sixteenth Amendment.[2] As to the Act of Congress, all the judges of the United States Supreme Court disagree with him.[3] As to the Sixteenth Amendment, four agree with him and five disagree.[4]

On the question whether a stock dividend goes to the life tenant as income or to the remainderman as capital, there are at least three rules. The United States Supreme Court[5] and a minority of state courts give it to the remainderman. Among these is Massachusetts,[6] though it holds the dividend taxable as income. England gives the stock dividend to the life tenant if it is an ordinary dividend, and to the remainderman if it is an extraordinary one.[7] Pennsylvania[8] and a goodly number of her sister states[9] split it up. What comes from corporate profits acquired subsequent to the creation of the trust goes to the life tenant; what comes from earlier accumulations is kept for the remainderman.

Some of these diversities represent flat disagreement among the judges. But others do not. Four judges of the Supreme Court vary the meaning of the word according to the document in which it appears.[10] Eight of them let Mr. Justice Holmes say that it might so vary.[11] The Massachusetts court makes the meaning depend on the kind of issue which calls for a definition. It is influenced by the consideration of what difference it makes whether you call a stock dividend income or not income. Sometimes it makes one difference; sometimes, quite another. The differences between these differences ought to make a difference. This is the way wise men deal with practical matters. If words let them do what they think best in the

[1] *Tax Commissioner* v. *Putnam*, 227 Mass. 522.

[2] *Towne* v. *Eisner*, 242 Fed. 702.

[3] *Towne* v. *Eisner*, 245 U. S. 418.

[4] *Eisner* v. *Macomber*, 40 Sup. Ct. 189. The five who think a stock dividend not income within the meaning of the Sixteenth Amendment are Chief Justice White and Justices McKenna, Pitney, Van Devanter and McReynolds. There are two minority opinions: one by Mr. Justice Brandeis, in which Mr. Justice Clarke concurs; the other by Mr. Justice Holmes, in which Mr. Justice Day concurs.

[5] *Gibbons* v. *Mahon*, 136 U. S. 549.

[6] *Minot* v. *Paine*, 99 Mass. 101.

[7] See note on pages 801-802 to *Brander* v. *Brander*, 4 Ves. Jr. 800 (American Edition).

[8] *Earp's Appeal*, 28 Pa. St. 368.

[9] See cases cited in *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 532.

[10] Compare *Towne* v. *Eisner*, 245 U. S. 418, with *Eisner* v. *Macomber*, 40 Sup. Ct. 189.

[11] The decision in *Towne* v. *Eisner*, 245 U. S. 418 was unanimous. Mr. Justice McKenna, however, limited his concurrence to the result, thus indicating that he alone objected to Mr. Justice Holmes' statement that the word income might have a different meaning in the Constitution from what it has in a statute.

particular circumstances of each particular case, they do it. Sometimes a word is so specific and inflexible that they have no choice if they are to keep faith. But not many words are like this. Otherwise there would not be so many lawsuits. Otherwise the same plank in a party platform would not allure the hopes and allay the fears of those who fear and those who hope for the same thing.

I

The argument on the question whether a stock dividend may be considered income has three strands: the political, the legal and the economic. The political element is important, and possibly is present, only when the issue is whether legislation is constitutional. In *Eisner* v. *Macomber*,[12] which held that Congress was without constitutional power to impose a tax on stock dividends as income without apportioning the tax among the states according to population, Mr. Justice Holmes' dissent went on political grounds. There was no denial by any of the judges that Congress has power to tax stock dividends. The question was whether such tax was a direct tax and, if so, whether the Sixteenth Amendment relieved it from the requirement of apportionment, as it concededly did if a stock dividend was income to the recipient. Mr. Justice Holmes said that the Sixteenth Amendment was passed for the purpose of doing away with nice questions as to what might be direct taxes. He thought that under the Amendment Congress might tax as income anything which common understanding might regard as income. His too terse dissent is a blend of two ideas: (1) that if folks in general would think of a stock dividend as income, the Sixteenth Amendment makes it taxable as such; (2) that even if a stock dividend is not income, the Amendment was designed to advise the court to be tolerant towards a Congressional affirmation that a tax thereon is an indirect tax.

Mr. Justice Brandeis in his dissenting opinion also adduces political considerations as to the restricted function of the judiciary in declaring Acts of Congress unconstitutional. The Massachusetts Supreme Court tells us that the word "income" in the Forty-fourth Amendment to the Massachusetts constitution "was employed to express a comprehensive idea" and "is not to be given a narrow or constricted meaning." Chief Justice Rugg says that income "must be interpreted as including every item which by any reasonable construction can fairly be regarded as income." Those who have held stock dividends taxable have been influenced by the policy that a court should not declare legislation unconstitutional until it has given it the benefit of every reasonable doubt. This policy is supposed to be a firmly established canon of constitutional construction. It is, however, honored in the breach as well as in the observance. What individual judges will do doubtless depends in considerable measure upon a judgment as to the reasonableness of the doubt. Judging from the cases, a doubt is not reasonable merely because it is held by four members of the court. Each decides for himself. The majority in *Eisner* v. *Macomber* find no difficulty in overcoming any doubt that may have suggested itself to their minds. They say that unless a stock dividend really is income it cannot be taxed as such, and that "Congress cannot by any definition it may adopt conclude the matter."

II

This brings us to the question whether a stock dividend really is income. The answer is made somewhat difficult by the fact that income has more than one necessary element and by the further fact that what a stock dividend conveys to its recipient depends upon circumstances that may be peculiar to each recipient. No rule as to the taxability of stock dividends as income will work the same result in all cases. Some features of the problem are peculiarly economic in character; others are peculiarly legal; some are mixed. All of course are legal in the sense that courts have the last guess. The courts alone speak with authority, though it may be a foolish authority. But the work of the courts is of at least two kinds. They have to discover the substance of what has happened in a practical, business sense. Here they may look to economists for light. They must also deal with certain forms which are of legal creation and which for convenience, real or assumed, are sometimes held to be controlling over substance. The

[12] 40 Sup. Ct. 189.

economist may insist that the form is a form and nothing else and should be given no recognition. But the court may tell him to mind his own affairs.

What I am trying to say will perhaps be made clearer as I go along. Take, for example, the question of what a stockholder gets from a cash dividend paid him by a corporation. Is this income or is it not? Even in the extreme case where the dividend comes from corporate earnings accumulated before the stockholder bought his stock, the court would say that this cash dividend is income.[13] So also, if the dividend is paid, not in cash, but in property such as whiskey or the stock of another corporation.[14] The economist may insist that such a dividend cannot be income because it represents no economic gain to the recipient. But the court will not listen. It finds it undesirable to go into such refinements. It is more convenient to treat the corporation as something entirely distinct from the stockholders, and to insist that the cash or the whiskey or the stock of another corporation is something entirely new which the stockholder did not have before, even though its economic value was part and parcel of the economic value of his shares of stock. The court will recognize that such a dividend is not in and of itself a gain to the stockholder — certainly not to the extent of the value of the dividend. But it will answer that it is the fruit of a gain to the stockholder whenever it comes from corporate earnings gained while the stockholder was a stockholder; it chooses to regard this as the typical case; in order to have a convenient general rule the sports will be overlooked.

Another recognized requisite of income from property is that the gain be separated from the mass which produces it. Here again what is a sufficient separation seems to be a legal rather than an economic question. It depends on judicial fiat. When a stockholder gets a stock dividend, he gets something that he did not have before. Its value, like that of a cash dividend, may have been his for some time. But he didn't have this value in this particular shape. Is the rib from the old Adam still part of the old Adam or has the conversion which has occurred amounted to a separation? The stock dividend is in some respects like the cash dividend and like the dividend in stock of another corporation; in other respects it is different. It is unlike the cash dividend, because the stockholder has to sell it to make it pay a tax. But so he does the dividend in stock of another corporation. So this distinction can't in and of itself be controlling. But the sale of a dividend in stock of another corporation leaves the stockholder's proportional interest in his own corporation just as it stood before. The sale of a dividend in stock of his own corporation reduces his proportionate interest. Should this be controlling and make us hold that a stock dividend is not income?

A number of American courts answer in the negative, when the question is whether the stock dividend should go to the life tenant as income or to the remainderman as capital. They are satisfied with the stock dividend as an adequate separation from the mass from which it issues. But—and this is important—they do not say that this separation necessarily makes the whole dividend income. They say that it makes income only of that part of the value of the dividend which comes from earnings of the corporation subsequent to the creation of the trust. The stock dividend will do as a separation in so far, and only in so far, as it represents an increment of the estate. But none the less it is the separation by means of the stock dividend that makes those gains income of the estate; if no dividend is issued and the parent stock merely increases in value, the remainderman gets the benefit. The payment of the stock dividend makes the "corporation no poorer and the stockholder no richer than they were before," as Mr. Justice Holmes put it in *Towne* v. *Eisner*. But to the extent that it evidences how much richer a trust estate now is than it was when it started, it is held by a number of American courts to be income to the estate and therefore distributable to the life tenant. The English rule approximates roughly the same result when it calls a stock dividend income if it is ordinary in character and capital if it is extraordinary. It is satisfied with the issue of the dividend as a fulfilment of the requirement of separation, provided the dividend is the fruit of normal recurring gains.

These rules ought to satisfy the econo-

[13] *Lynch* v. *Hornby*, 247 U. S. 339.

[14] *Peabody* v. *Eisner*, 247 U. S. 347.

must. They hold stock dividends income only to the extent that they represent a gain. They demand something by way of separation. This something is not a parting with assets by the corporation—not a payment to the stockholder. But it is the distribution to stockholders of a new, handy, independent form of control of so much of their proprietary interest in the corporation as the shares thus received bear to the new capitalization of the concern. True, this new form of control makes the stockholding trust-estate no richer than it was immediately before. But this can be said of a cash payment for services by a debtor who has given unquestioned security for his debt. Separation is instantaneous. Gain is not. There would seldom be income if the gain and the separation had to be completely contemporaneous. We have to be satisfied if the separation represents a gain. Our only question here is whether there is really a separation. This ought to be a question for the lawyer to settle. The economist, who is a man of substance, is not versed in the mysteries of corporate-entity metaphysics. Without the lawyer's notion that a corporation is a real person and not a mere contrivance to get a joint agency, the stockholder would receive income as the corporation receives it for him. Dismiss the corporate entity as a myth, and there would be no need of a dividend of any kind to make corporate income stockholders' income. Surely it is for the lawyer rather than for the economist to decide whether the fact that the corporation parts with nothing when it gives the stockholder a symbol of his past gain, is or is not to prevent such a symbol from being income to the stockholder.

III

This gives us the necessary background for a review of the debate between Mr. Justice Brandeis and Mr. Justice Pitney in *Eisner* v. *Macomber*. Only brief mention need be made of that part of the quarrel which was considered in the last issue. Mr. Justice Brandeis sought somewhat indirectly to look at the tax on stock dividends as a way of getting at a stockholder's interest in corporate earnings, not as the earnings accrued, but after they had accrued and when they were in effect distributed by a stock dividend. But, as Mr. Justice Pitney points out, the stock dividend stands for actual gain to the stockholder only to the extent that he had held his stock while the corporation was reaping the profits later capitalized by the dividend. Mr. Justice Brandeis has no answer to this, except to say that the hardship was somewhat mitigated by the fact that Congress limited the assessment to the fruits of corporate accumulations since March 1, 1913. "Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed." This notice was not given until September 8, 1916. Its only material influence would be to depress somewhat the price that stockholders would otherwise pay for stock in corporations having a surplus susceptible of being later "in effect distributed by a stock dividend." It warns future purchasers of stock that what they must part with capital to get may later be taxed to them as income if the corporation turns surplus into capital. They are still to be taxed on stock dividends irrespective of any gain accruing to them therefrom. Though the assessment excludes the contribution of corporate surplus accumulated before March 1, 1913, it does not exclude the fruits of surplus accumulated between that time and the date when the stockholder buys his parent stock. There may for a time be some mercy in calling a halt at March 1, 1913; but this will be increasingly fanciful as the years go by and 1913 recedes farther and farther from the present.

In justice to Mr. Justice Brandeis, it should be pointed out that the analysis just summarized was preceded by the statement:

> "The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid or in the year preceding."

Cash dividends, though paid from corporate accumulations of long standing, are held taxable to the stockholder as income.[15] This tax neglects the element of gain to the stockholder as much as does the tax on stock dividends. Yet the hardship was not given recognition by the Supreme Court. Congress has diminished the possibility of serious hardship by letting dividends from

[15] *Lynch* v. *Hornby*, 247 U. S. 339.

accumulations back of March 1, 1913, go free. This exempted over eighteen per cent of Mrs. Macomber's stock dividend in the case before the court. Even if stock dividends are apt to come from more antique corporate accumulations than are cash dividends, ordinary or extraordinary, the respect for old age shown by the Act of 1916 makes the tax on stock dividends no more, and perhaps less, unkind than the tax sustained in *Lynch* v. *Hornby*.

This brings us to Mr. Justice Brandeis' major position. He plants himself firmly on *Lynch* v. *Hornby* and *Peabody* v. *Eisner*, holding dividends in cash or other assets of a corporation taxable as income to the stockholder at their full value, without regard to the amount of economic gain which they represent. He insists that the stock dividend is in all substance similar to the dividend in cash or property. He opens his dissent by saying:

"Financiers, with the aid of lawyers, devised long ago two different methods by which a corportion can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders."

One of these methods is to shift surplus as a bookkeeping item to capital, and to issue new shares of paid-up stock to the stockholders. The other is to increase the capital stock, offer the new shares to stockholders at less than they are worth and distribute cash dividends to the amount of the price of the new shares. The stockholder either uses his cash dividend to buy new stock, or keeps it and sells his right to subscribe to the new stock. These two methods, says Mr. Justice Brandeis, have long been recognized equivalents. The name "stock dividend" has commonly been given to both. It is conceded that the complicated method renders the stockholder taxable on the cash dividend as income, though he endorses his check and sends it to the corporation in payment for new shares of stock. Why should a different result flow from the simple and direct method by which the corporation in effect acts as agent for the stockholder to use the amount due him to pay for the new stock?

Mr. Justice Pitney does not succeed in defacing Mr. Justice Brandeis' picture of the substantial similarity of these two methods of cutting melons. He points out that the shareholder, unless he has other resources, must sell a stock dividend to get the wherewithal to pay a tax, and says:

"Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax."

This, however, is equally true of the dividend in stock of another corporation, held taxable as income in *Peabody* v. *Eisner*.[16] But, says Mr. Justice Pitney, if the stockholder turns a stock dividend into cash, his part in the control of the company is diminished. In answer Mr. Justice Brandeis asserts that "neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved." He fails to say in support of this, as he well might, that the use by a stockholder of an extraordinary cash dividend for other purposes than taking his proportion of the increased stock operates to diminish his part in the control of the company. Moreover, this loss of proportionate control by parting with a stock dividend does not save the remainderman from yielding the stock dividend to the life tenant in those states which give the life tenant stock dividends from corporate earnings subsequent to the creation of the trust. Mr. Justice Pitney does not, and can not, distinguish stock dividends substantially from other dividends held taxable, either on the ground that they are not cash or that their realization in cash disturbs the proportionate interest of the stockholder in the corporation.

The distinction on which Mr. Justice Pitney places his main reliance is that a stock dividend, unlike a cash dividend or a dividend in property, takes nothing from the assets of the corporation. Defining income from property as "gain derived from capital," he says:

"Here we have the essential matter: *not* a gain *accruing* to capital, not *a growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed* from the capital however invested or employed, and *coming in*, being '*derived*', that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal—*that* is income derived from property. Nothing else answers this description."

[16] Note 14, *supra*.

The italics are Mr. Justice Pitney's. He then emulates Mr. Justice Brandeis' fondness for substantial similarities, and compares the situation of a stockholder who has received a stock dividend with one who has not. The comparison is between a corporation that keeps its accumulations on its books as surplus and one that transfers them to capital and issues stock dividends. In the former case the stockholder gets none of the assets. He has only an enhancement in the value of his stock interest in the corporation. It is not disputed that he has not *received* taxable income. In the latter case, likewise, the stockholder gets none of the corporate assets. He has only an enhancement in the value of his stock interest in the corporation. The only difference between the two cases is that in the former the value of the enhancement is distributed among the original shares of stock; in the latter, the original shares lose their respective enhancements which are now expressed in the new shares. "The new certificates simply increase the number of the shares, with consequent dilution of the value of each share." The corporate bookkeeping by which surplus becomes capital and new shares are issued "affects only the form, not the essence of the 'liability' acknowledged by the corporation to its own shareholders."

This is a hard nut for Mr. Justice Brandeis to crack. He nowhere directly refutes or punctures this adduced similarity in substance between the issue of a stock dividend and the issue of no dividend. He can't. What he does is to suppose a distribution by the corporation of its own bonds or preferred stock, or of common stock, issued to sell to the public and then withdrawn from the market and given to stockholders instead of the cash dividend originally designed for them. He then assumes that dividends in such stock or bonds would be taxable income, although such a dividend does not result in any segregation of assets for the stockholder. Hence, segregation of assets is not essential. But the initial assumption of a concession that dividends in such stock or bonds would be taxable income is made by Mr. Justice Brandeis without any warrant in the opinion of the majority. Such a dividend, like a stock dividend, can as truly be said to affect "only the form, not the essence of the 'liability' acknowledged by the corporation to its own shareholders." There has been no payment, no receipt, of corporate assets. This assumed concession flies in the face of Mr. Justice Pitney's insistence to the contrary when he says:

> "The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from the employment of his money and that of the other stockholders in the business of the company, still remain the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment."

IV

So we come to a perfect *impasse*. Mr. Justice Brandeis is correct in saying that a stock dividend is substantially like other dividends held to be taxable income. Mr. Justice Pitney is correct in saying that a stock dividend is substantially like no dividend, when concededly there is no taxable income. Neither successfully dislodges the other from his substantial similarity. So it goes with argument by analogy. Get the other man to accept your initial datum as worthy of all acceptation, and you have him. But he can get you in the same way by inducing you to plant yourself on a datum that he may choose. That is why so much argument reduces itself to competing reiteration of the exclusive validity of different starting points. For those who think of debating as a sport, this is cheering. It is an assurance that the game is not in danger of desuetude because all disputes are likely to be settled. But to those who are seeking a safe and sane settlement of particular issues, an *impasse* produced by argument from analogy is annoying. It leaves you still in the air. That is where we are left by the arguments of Mr. Justice Brandeis and of Mr. Justice Pitney which we have thus far been considering. How, then, shall we get back to earth?

Let us try going back of the substantial similarities of each justice and looking for other substances behind both. Mr. Justice Pitney starts with a situation where the stockholder has received nothing, but may have enjoyed a gain. Mr. Justice Brandeis looks to cases where the stockholder has

received something that in whole or in part is not a gain. Which is the more substantial requisite in the conception of income from capital; gain or its separation and receipt? Obviously, it is gain. The rates imposed in income taxes are commonly higher than the annual rate of income return on capital. A fifty per cent rate on income normally is equivalent to a three per cent rate on capital. If you include in income what is in substance nothing but a return of capital and not a gain from capital, you turn what professes to be a three per cent tax on capital into a fifty per cent tax. Pretending to deliver a light blow, you land what if once repeated is a knockout. If changes in the form of capital assets may be taxed as income, a few shifts in a year might make a man liable to a levy larger than all he is worth. Plainly, therefore, it takes a very good reason to justify taxing a man on putative income when he has enjoyed no gain. In order to prevent this, a court may very well be as formal and technical as it pleases. If for any reason it has precluded itself from relying solely on the fact that the stockholder has enjoyed no gain, it may still clutch at the straw that the transaction does not satisfy the requirement of separation and receipt. It may tighten or relax its conception of separation and receipt as it has to deal with the absence or the presence of gain.

With this in mind, let us look at Mr. Justice Brandeis' justification for his assertion that "clearly segregation of assets in a physical sense is not an essential of income." In support of this he says: "The year's gains of a partner is taxable as income, although there, likewise, no segregation of his share in the gains from that of his partners is had." But the partner is taxed as the recipient of income only on his actual gain, and the partnership is not separately taxed. So the court may very well regard receipt by the partnership as a satisfactory substitute for receipt by the partners. The stock-dividend tax did not look at receipt by the corporation as receipt by the stockholder. It predicated receipt on the acquisition of the stock dividend, even though the dividend represented no gain.

When we look at the cases in which the receipt of a stock dividend has been held to be the receipt of income which goes to a life tenant rather than to the remainderman of a trust estate, we find that the stock dividend satisfies the requirement of receipt only to the extent that it represents a gain to the estate. Mr. Justice Brandeis is somewhat misleading when in reference to Mrs. Macomber's stock dividend he says:

> "Such a stock dividend is income as distinguished from capital both under the law of New York and under the law of California; because in both States every dividend representing profits is deemed to be income whether paid in cash or in stock."

The cases which he cites make the stock dividend income as distinguished from capital only to the extent that it represents profits to the recipient, not to the extent that it represents profits to the corporation. Mr. Justice Brandeis makes this clear enough elsewhere in his opinion, but he might well have been more specific here. His statement would do if Mrs. Macomber was under the statute liable only to the extent that the stock dividend represented profits to her. Neither the majority nor the minority opinion tells when she bought her stock. Mr. Justice Brandeis is content with the statement that she "was, in the year 1916, a stockholder." Therefore when he speaks of "such a dividend" being income under the laws of New York and of California, his words are open to the construction that a stock dividend from assets accumulated by the corporation before the recipient acquired his parent stock is income in New York and California. This, indeed, is the only construction that would be of genuine service to his contention. But it is a construction not warranted by the facts and the law.

We see, then, that the premise on which Mr. Justice Brandeis bases his dissent is one of legal income which is not economic income: receipt without corresponding gain. *Lynch* v. *Hornby* and *Peabody* v. *Eisner* are shocking to substantial conceptions of income. Without doubt it is convenient and often it may be necessary to forget that the corporation is only a method by which individuals pool their interests, and to hold that when a corporation turns over something to a stockholder he must be treated as though he gains all that he gets. Nevertheless this is not the substantial fact. Any conception of income that professes to be grounded on considerations of substance should look to the sub-

status of the major, as well as of the minor, premise. This, Mr. Justice Brandeis fails to do. He takes *Lynch* v. *Hornby* and *Peabody* v. *Eisner* as standing for complete and universal absolution of the sin of absence of gain in any and every conception of income. This stretches them beyond their facts. It does not follow that because the Supreme Court winked at vice under special and peculiar circumstances, it must close its eyes to the same wickedness wherever it occurs. If the logic of the Stock Dividend Case brings us to a choice between the premises of the minority and those of the majority, we find strong substantial reasons for refusing to accept as controlling the analogy on which the minority rely.

On the other hand, the premise of the majority is not wholly apposite to the issue in the Stock Dividend Case. A situation where there is no dividend of any kind is not the same as one in which there is a dividend. Gain alone may not yield legal income, and yet gain plus a stock dividend may fulfill all reasonable requirements. The majority stand on firm ground of substance when they hold that a stock dividend without resulting gain is not income. But they might well have stopped here. They put an exceedingly strict interpretation on the word "incomes" in a constitutional amendment when they make it exclude actual gain coming to hand in the convenient form of a stock dividend. True, the rule of the United States Supreme Court is that every stock dividend goes to the remainderman as capital even though it represents a gain to the estate subsequent to its creation. But this is also the rule in Massachusetts. Yet the Massachusetts court did not deem it controlling on the question whether a stock dividend is taxable as income to the recipient. The majority of the Supreme Court seem overtechnical when they plant themselves so doggedly on the position that no part of a stock dividend satisfies the meaning of "income", in the Sixteenth Amendment, because no part of it is a transfer of assets from the corporation to the stockholder. To the extent that the stock dividend represents actual gain, the Supreme Court should have been satisfied with the new stock issue as a sufficient receipt or segregation. Whether this should have resulted in a different disposition of *Eisner* v. *Macomber* is a minor matter. Since Congress dealt with stock dividends as indivisible, the court cannot be greatly criticized for letting the particular tax before it stand or fall as a whole. Yet in a suit to recover back a tax paid, it was possible for the court to make a separation even though the statute failed to do so. At any rate it should have left open the question whether stock dividends may be taxed as income to the extent that they represent actual gain, even if it refrained from answering the question in the affirmative.

V

This position seems sufficiently tenable to be brought specifically before the court in case Congress deems it desirable to try to include in income the actual gain represented by a stock dividend. It ought to be urged by the Government in any future litigation over the question whether "rights" to subscribe for new stock are taxable income. If the "rights" are sold for cash, the cash is certainly income to the extent that it is a gain to the seller. If the "rights" are availed of as part payment for purchase of new stock, the same result should clearly follow.[17] Indeed, the "right" may well be regarded as the equivalent of cash even though the stock dividend is not. It is an obligation of the corporation to accept it in lieu of cash for the purchase of new stock either by the original obligee or by a transferee. Rights to subscribe for new stock at less than its market value are much more apt to represent actual gain to most stockholders than is an extraordinary cash dividend equal to the price of the new shares offered at the same time. If the Supreme Court, as in *Lynch* v. *Hornby*, can disregard the fact that such a cash dividend is apt to bring to many recipients less gain than its market value, it can as readily refrain from close scrutiny of the gain element in the acquisition of rights to subscribe for new shares. Such rights have in common with the stock dividend the fact that they are not in themselves a transfer of assets from the corporation. But they differ in that they are devised for use as a medium of exchange and an instrument of pur-

[17] See *Stone et al.* v. *Tax Commissioner* (Mass.), 126 N. E. 373, holding that profit made by exchanging stock of two corporations is taxable as income.

chasing power and are not merely a sign of a recataloguing of a stockholder's existing interest in the corporation.

In some quarters the effect of the Stock Dividend Decision on the fiscal policy of the Government appears to have been exaggerated. Mr. Justice Pitney points out that a profit realized from the sale of a stock dividend is income, "and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment." The same must be true of a profit realized from the sale of shares purchased by the stockholder. To determine whether the sale of any stock results in a profit accruing since March 1, 1913, the value of the stockholder's interest in the corporation at that date or at the later date or dates when he acquired his stock must first be determined. The difference between this and the total value of his interest in the corporation at the time he disposes of a part thereof represents the gain which he has enjoyed. By a sale of any stock he realizes such part of that gain as the number of shares sold bears to the total number of shares which he owns at that time.[18] The effect, then, of the Stock Dividend Decision is to postpone the clutch of the income tax until the stockholder sells some of his stock. Some pretty questions may be raised as to the rates which can be applied at time of sale. Must they be the rates in force for the year when the sale occurs, or may they be the rates in force when the stock dividend was acquired or when the corporation accumulated the profits from which the dividend issued? Can any former rate be used when the stockholder sells some of his original stock and retains his stock dividend? Unless these questions can be answered in the affirmative, recipients of stock dividends may gain some material permanent advantages from *Eisner* v. *Macomber*.

It seems clear, however, that Congress has full power to remedy the situation prospectively. It can hardly be doubted that a tax on the issue of a stock dividend would be an indirect tax,[19] and that the amount of the tax might be made so onerous[20] that corporations would prefer to increase their capitalization by issuing extraordinary cash dividends coupled with rights to subscribe for new shares. Then the stockholder would be taxable on his cash dividend under *Lynch* v. *Hornby*. To induce distribution among stockholders the corporation might be subjected to a specially high excise on that part of its annual earnings which are not distributed.[21] It is to be noted also that Mr. Justice Pitney is careful to say that he is "considering the taxability of *bona fide* stock dividends only." Thus he implies that the court will be astute to discover methods of corporate financing which by some roundabout process may result in an actual distribution of cash or property of the corporation. And there is nothing in the majority opinion that necessarily casts any doubt on the validity of Section 220 of the Act of 1918 which disregards the corporation and taxes the stockholder on his share of corporate earnings, whenever the corporation is deemed to accumulate its earnings for the primary purpose of shielding its stockholders from surtaxes.[22] All in all, it seems that the Government can still devise means which will prevent the escape of

[18] The present Treasury Regulations (Article 39) allow each separate certificate to be treated as separate property where its identity can be followed through purchases and sales. Where that is not possible, any sale of stock shall be regarded as a sale of the earliest purchased. Mr. Montgomery, however, thinks the theory of the regulation wrong and says that "when different purchases of the same issue of stock are made the actual result is an average cost." (*Income Tax Procedure, 1920*, page 364.) Dealers in securities are allowed to pursue the inventory method. (*Ibid.*, page 305.) It can hardly be doubted that Congress might prescribe the use of the average method, if it chooses. Clearly Mr. Justice Brandeis is unduly despondent when he says that, as a result of the decision of the majority, stockholders "so far as their profits are represented by stock dividends . . . will pay these taxes not upon their income but only upon the income of their income." This is true only of stockholders who never part with their stock dividends or any of their parent stock.

[19] See *Thomas* v. *United States*, 192 U. S. 363, holding a stamp tax on an agreement to sell corporate stock to be an indirect tax.

[20] *McCray* v. *United States*, 195 U. S. 27.

[21] For a general discussion of the power of Congress to levy excise taxes, see A. A. Ballantine, "Some Constitutional Aspects of the Excess Profits Tax", 29 *Yale Law Journal*, 625 (April, 1920).

[22] For a consideration of the pros and contras of this contention, see the article on "The Stock Dividend Decision and the Corporate Nonentity" in this BULLETIN for April, 1920 (volume 5, number 7, page 201).

any genuine stockholder's income from federal taxation. In so far as these devices force a distribution in cash, the Government can tax stockholders on receipts without inquiring into the extent to which such receipts represent actual gain.

As to the states, *Eisner* v. *Macomber* appears to leave them free to include stock dividends in what they may call an income tax. While the Supreme Court explicitly disagrees with the reasoning of the Massachusetts court in *Tax Commissioner* v. *Putnam*,[23] which held stock dividends taxable as income under the Massachusetts constitutional amendment, there is no hint that this judgment is reviewable by the Supreme Court. On the contrary, Mr. Justice Pitney says that "the Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction." If, as reported, the New York comptroller has ruled that *Eisner* v. *Macomber* operates to exclude stock dividends from the New York income tax, he seems to have been guilty of considerable presumption. The fact that the New York law adopts the interpretation of income contained in the federal law is not material, for there is no doubt that the federal law defined income so as to include stock dividends. The clauses of the Federal Constitution which this definition was held to offend do not limit the taxing powers of the states. The only protection which recipients of stock dividends could find in the Federal Constitution against state income taxation must be extracted from the due-process and equal-protection clauses of the Fourteenth Amendment. There are no decisions of the Supreme Court which proffer hope that these clauses would prove a shield.

[23] 227 Mass. 522.

VI

In closing, it should be pointed out that the flaws in Mr. Justice Brandeis' analysis do not militate against the validity of the grounds relied on by Mr. Justice Holmes in his separate dissent. He recognized fully that "on sound principles the stock dividend was not income." But he thought that the court was not authorized to restrict the meaning of "incomes" in the Sixteenth Amendment to that which on sound principles is such. He thought also that the Amendment was designed to do away with nice questions as to what are direct taxes. If we accept as the standard of construction and interpretation "the general run of thought in the community," Mr. Justice Holmes is pretty certainly right.[24] As already pointed out, his line of approach to the constitutional issue was distinctly political in character. While the political element in the constitutional issue is not wholly independent from the legal and economic elements, it transcends both. There is much to be said in favor of the political wisdom of Mr. Justice Holmes and Mr. Justice Day, even though we are quite certain that the legal and economic argument of Mr. Justice Pitney is more meritorious than that of Mr. Justice Brandeis.

[24] This is elaborated somewhat in an article entitled "Stock Dividends, Direct Taxes, and the Sixteenth Amendment" published in the *Columbia Law Review* for May, 1920 (volume 20, page —).

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

Louisiana Tax System Discussed—"Valuation", "Value", "Actual Cash Value". — An interpretation of the complicated methods of taxation existing as a result of recent constitutional and statutory changes in Louisiana is to be found in a recent decision. Suit was brought to annul, in whole or in part, an assessment on the ground that it violated the constitutional provision. It appeared that the property in question had been assessed by the state board for state purposes for a sum considerably less than the assessment made by the local authorities for local purposes. Plaintiff claimed that the law contemplated two "actual cash values"

of the same property, which was impossible and that as the lower of the two assessments exceeded the actual cash value, it contravened the constitutional provision prohibiting such excessive assessment; that moreover, as that local assessment could never constitutionally exceed that made by the state board, as it did in this case, that assessment was void either in whole or in part. The situation thus involved an interpretation of the curiously complicated statutory and constitutional provisions established in Louisiana at the time.

The court, in sustaining both assessments, held that the question of excessive assessment was eliminated because the taxpayer had made no objection at the time required by the statute, his reliance being, as above stated, solely upon illegality of the assessments. They held that this contention arose from a confusion of the term "actual cash value" as used in the statute with the term "valuation" also used; that value was an attribute of property due to use, product therefrom or sentimental association; that "actual cash value" was the price that the law arbitrarily assumed the property would bring if sold for cash; that "valuation" on the other hand was merely an estimate which the assessors, either state or local, were required to make of the "actual cash value". "It is clear then," they say, "that neither value is a determined factor like the length of a yardstick or the weight of a coin," and "though property can have but one value at one and the same time . . . which neither the assessor nor the lawmakers can fix or change by mere declaration, there may be, and frequently are, as many estimates, or valuations, of that value as there are individuals who are called upon to express their opinions upon the subject."

Hence they conclude that as the law is not to be so construed as to lead to an absurdity or impossibility, it "does not contemplate the fixing of two actual cash values upon the same property at the same time but does contemplate that the state board shall make its 'valuation' of the actual cash value . . . which may be different from the valuation to be made by the local authorities for the purposes of local taxation."

We must refer the puzzled reader to the full opinion for explanation of the court's meaning.—*Soniat* v. *Board of State Affairs*, 83 So. 760.

Tax Commission's Authority—Equalization — Horizontal Increase. — The state tax commission idea, the cause of improvements in assessment work and particularly the Mississippi Tax Commission, have gained a distinct victory through a recent decision in that state.

Acting pursuant to the tax commission act, the Commission ordered certain percentages added to various classes of property in a county based upon its examination of assessments in the county and in an effort to equalize them with those in other counties. The county authorities refused to make the increases ordered, setting up among other reasons that to do so would violate both the constitution and statutory law and would result in assessments greatly in excess of the true value of the property.

Thereupon the Attorney General instituted mandamus proceedings to compel compliance, which resulted in the issuance of a writ. Upon failure to obey the same, contempt proceedings were instituted under which the supervisors were adjudged in contempt and sentenced to be confined in the county jail until they should comply fully with the writ and in addition were fined.

Upon appeal to the supreme court, the tax commission act was wholly upheld and the respective powers of the tax commission and the county supervisors clearly defined, the former being empowered to equalize as between counties, and in so doing to issue orders, which are absolutely binding upon the supervisors, to accomplish the results demanded; the supervisors, on the other hand, are given full authority to equalize and adjust values as between properties, in carrying out the instructions of the commission, with the definite requirement that if such instructions cannot be obeyed through such adjustments, they must make the horizontal increases so as to accomplish the required results.

The constitutional provision against assessments at greater than actual value is left in full vigor through the remedy given any taxpayer aggrieved by the action of either the state board or the local boards.

The result of this decision should go far towards injecting a wholesome regard for the tax commission law which, as in other

states, has here been subjected to no little criticism when it operated to disturb long-standing methods in local assessment.—*Taylor et al.* v. *State of Mississippi, ex rel. Collins, Attorney General,* 83 So. 810.

Tax Commission — Equalization — Notice of Horizontal Increase Unnecessary.—The statutes of Ohio authorized the state tax commission in equalizing assessments, to increase or decrease the assessments of any class of property in a county by a given percentage. Complainant contested an assessment which had been thus increased, claiming the action invalid for lack of notice. The court held that no notice was necessary where in the exercise of its powers of equalization the commission ordered an increase affecting an entire class of property within a county; the fact that the statute required no such notice did not render the action obnoxious to the constitution; the provision for appeal from the action of the county board to the tax commission and to the courts from the action of the latter to enjoin the collection of illegal taxes, fulfilled the requirement of due process.—*Hammond* v. *Winder,* 126 N. E. 409.

Franchise Tax — "Surplus". — The Missouri Supreme Court has recently construed the corporation franchise tax law (L. 1917, p. 217) to authorize a tax measured by assets as contended for by the state tax commission rather than by assets less indebtedness as was contended by the plaintiff corporation to be the meaning of the phrase "outstanding capital stock and surplus" used in the law as the measure of the tax.

This unique departure from the heretofore universally recognized conception of this sort of franchise tax and of its measure and the apparent disregard of the seemingly obvious meaning of "surplus" merits an attempt to explain the court's reasoning.

The court freely grants that the word "surplus" as construed in the cases cited by counsel, means the excess of assets over debts and liabilities (241 Fed. 332; 146 N. Y. Supp. 646), but holds that in each case the definition is made with respect to the circumstances of the particular case in question and that such must be the treatment in this case. It therefore assumes that the legislature intended to lay a tax not as a property tax, but as a franchise tax, measured by property, upon not only the capital stock but upon any surplus *property* employed in the state, and it reaches this construction by contemplating the obvious evasion of the taxation which it assumes was intended, by the varying methods of financing which a corporation might select for use, as through the use of borrowed money.

From this assumption of the intent of the legislature, the court reaches a unanimous conclusion that the word "surplus" in this particular statute means the "excess of assets employed in the business over outstanding capital stock, without regard to liabilities."

The reviewer looks upon such a decision as this as most unfortunate in that it tends to destroy one's confidence in the courts in tax cases. The technical word "surplus", often used in corporate taxation, has and can have but one meaning. The result is the virtual imposition of an additional property tax through the guise of a franchise tax.—*State ex rel. Marquette Hotel Inv. Co.* v. *State Tax Commission,* Missouri Supreme Court, April, 1920.

"Capital".—The term "capital" designates that portion of the assets of a corporation, regardless of their source, which is utilized for the conduct of the corporate business and for the purposes of deriving therefrom gains and profits. — *Turner* v. *Cattleman's Trust Co. of Ft. Worth,* 215 S. W. 831.

Capital Stock Tax, Nature of — Valuation of Bridge.—A tax on capital stock of a corporation is a personal property tax.

Where a bridge has no market value, its earning power is an important element in determining its taxable value, but the consideration for the lease is not evidence of fair value for the use of the bridge when it is purposely so used as to produce no income over and above interest, taxes, and repairs. — *People* v. *St. Louis Merchants' Bridge Co.,* 125 N. E. 752.

Capital Stock — "Manufacturing". —A corporation organized for the purpose of mining fire clay, fire sand, feldspar, and kaolin, with the right to prepare for market

and vend the product of the mines, that has leased its property to a company engaged in crushing and grinding rock into sand of specified grades of fineness, which is sometimes colored by the admixture of clay and used principally for molding in the steel foundry trade and to some extent for concrete in the building trade, is not engaged in "manufacturing" within the Pennsylvania Act allowing exemptions from capital stock tax of so much of the capital stock as is used in manufacturing.—*Commonwealth* v. *Welsh Mountain Mining & Kaolin Mfg. Co.,* 108 Atl. 722.

LICENSE — INTERSTATE COMMERCE — "ORIGINAL PACKAGE".—The recently enacted license tax law of New Mexico on the sale of gasoline (L. 1919, Ch. 93) was recently held invalid in part by the U. S. Supreme Court and temporary restraining orders affirmed.

The act imposes taxes upon the sale by distributors and retail dealers and requires a license to sell. The court, upon an analysis of the act, found that it was not an inspection tax merely but a tax upon the privilege of dealing in gasoline in the state. The plaintiffs' business consisted in part of shipping the gasoline into the state in tank cars and containers and selling the entire contents of a car or container. As to this branch, the court held the tax clearly a direct burden on interstate commerce, following the decision in *Standard Oil Company* v. *Graves,* 249 U. S. 389.

A second method pursued by plaintiffs was in selling gasoline from tank cars, barrels and packages in retail quantities to suit the purchasers. A business of this sort was held properly taxable although the gasoline was brought into the state in interstate commerce.

The fact that all gasoline sold was brought into the state from another state was held not to prevent the operation of the taxing power so long as no discrimination against the products of another state was shown (*Wagner & Sons* v. *Covington,* Dec. 8, 1919).

As it was impossible to determine from the bills the relative importance of the taxable and non-taxable classes of business, the question of the separability of the act was not passed upon and the temporary orders were affirmed.—*Askren, Att'y Gen'l* v. *Continental Oil Co.* (and two other similar cases), U. S. Sup. Ct., April 19, 1920.

LICENSE.—An ordinance which purports to impose a limitation on the conduct of a business and to require a license therefor, but which confers upon any officer or tribunal arbitrary control over all citizens in the exercise of a legitimate occupation and deprives those in like situation of equal protection in such occupation, is not a law but an attempt to make the arbiter a law in himself and is void.—*City of New Orleans* v. *Palmisano,* 83 So. 789.

FEDERAL INCOME TAX—EXEMPTIONS—FEDERAL FARM LOAN BONDS. — The supreme court has postponed action on the case involving the constitutionality of the exemption from income tax of bonds issued under the federal farm loan act, by ordering a reargument which cannot of course be had until fall.—*Smith* v. *Kansas City Title & Trust Co.,* U. S. Sup. Ct., April 26, 1920.

FEDERAL INCOME TAX — INSURANCE COMPANIES — DEDUCTION OF PREMIUM DIVIDENDS.—The Supreme Court has affirmed the judgment of the Circuit Court of Appeals (258 Fed. 81), holding that in arriving at the net income of mutual life insurance companies, under the act of 1913, only those dividends could be deducted which were actually used during the year in reducing the premium payments of individual policy-holders and that the act did not authorize the deduction of all dividends paid to policy-holders whether so used or not, including dividends paid on paid-up policies, as contended for by the company. The opinion of Mr. Justice Brandeis is interesting because of his careful analysis of the real nature of mutual life insurance as distinguished from fire or casualty insurance, in that it involves the definite idea of investment as well as protection. — *Penn Mutual Life Ins. Co.* v. Lederer, U. S. Sup. Ct., April 19, 1920.

FEDERAL INCOME TAX — INCOME RECEIVED IN 1918 FOR SERVICES RENDERED OVER A PERIOD OF YEARS.—A receiver of a railroad company appointed May, 1913, served until April, 1918. The District Court ordered a minimum compensation of $2,000 per month, commencing July, 1913.

In April, 1918, additional compensation of $100,000 was allowed and paid. In April, 1919, the order was amended to show that this $100,000 was earned and accrued during the entire period of the receivership. Income tax was assessed on the $100,000 as income for 1918, the year of its receipt. The receiver sought to have the income spread over the period of the receivership in accordance with the order of April, 1919. Held, that the $100,000 was taxable income for the year 1918, the year of its receipt.—*Jackson* v. *Smictanka,* U. S. D. C., Northern Dist. Ill.; E. Dist., Dec., 1919.

Federal Income Tax — Net Income Arising from Improvements under Lease. — Where a lessee, pursuant to the terms of a lease of land for twenty-six years, made in 1908, erected a building on the land which was completed in 1910 and forfeited the lease in 1916, the lessor reentering the premises, the value of the building erected under the lease is not income to the lessor for 1916. — *Cryan* v. *Wardell, Collector,* 263 Fed. 248.

Federal Income Tax — Depletion and Depreciation Deductions by Lessee of Mining Company.—Notwithstanding a minimum royalty provision in a mining lease, whereby the lessee was under affirmative obligation to remove—or at least pay for—about two-thirds of the ore then in the ground and the fact that this obligation probably covered all the ore mined during the taxing period involved, the lessee of the mining company was held not entitled to the deductions for depletion allowed by Act of Sept. 8, 1916, the presence or absence of such an obligation being an incident of a particular case which cannot control the general rule. The *Biwabik* case (247 U. S. 116) followed, and the court said, "We cannot conceive any substantial distinction as applied to a mine between that depreciation which was sought by mine owners under the earlier acts, and that depletion which was expressly allowed by the amendment of 1916."—*Weiss* v. *Mohawk Mining Co.,* U. S. C. C. A., 6th Cir., March 2, 1920, reversing the judgment of the District Court.

Federal Income Tax — Income Accrued Prior to January 1, 1909—Parent and Subsidiary Corporations.—Proceeds from claims definitely ascertained and vested before January, 1909, are not taxable income under the Act of 1913.

Where a corporation conveys property to a subsidiary corporation, under agreement that the latter will manage it and pay the net proceeds, after deducting necessary expenses, to the taxpayer corporation semi-annually, such payments are not taxable income in its hands under the Act of 1913 if the managing corporation has made return of and paid the taxes on the proceeds of the property.

Payments of interest accrued before January 1, 1909, although paid in 1911, are not taxable income in the hands of the payee, under the Corporation Excise Tax Act of 1909.

Proceeds from items definitely ascertained and vested before January 1, 1909, and on that day the property of the taxpayer are not taxable under the Corporation Excise Tax of 1909 when collected.—*Northern Pacific Ry. Co.* v. *Lynch,* U. S. Dist. Ct., Minn. Dist., March 1920.

Federal Income Tax — Salaries of Federal Judges. — The provision of Income Tax Act, Sec. 213, which, in requiring salaries generally to be included in gross income returns, specifies, among others, salaries of federal judges, held not in violation of Const., art. 3, sec. 1, which provides that the compensation of judges of the Supreme and inferior courts "shall not be diminished during their continuance in office."—*Evans* v. *Gore,* 262 Fed. 550. (This case now before the Supreme Court for decision.)

Federal Income Tax — Income — Deductions — Offsetting Erroneous Deductions against Excess Reported Income.—The value of hay grown and consumed upon a stock farm is an allowable deduction in an income tax return filed under the Act of 1909 if included in gross income, whether the hay was grown before or during the taxable year. Money received in 1909 in final payment for wool sold in 1908 is not income for 1909. No additional tax is due by reason of erroneous deductions, if a taxpayer also has erroneously included as income an amount in excess of the erroneous deductions, be-

cause the tax is measured by "net income" and the income reported by the taxpayer was in fact larger than "net income" as contemplated by the statute.—*United States* v. *Long,* U. S. D. C., Montana Dist.

FEDERAL INCOME TAX — "TAX FREE" RENTAL CONTRACTS.—Where a lessee covenants to pay all taxes and assessments upon the rent payable under the lease, it must pay the United States war excess profits tax assessed against the lessor on account of such rentals.—*Philadelphia G. & N. R. Co.* v. *Philadelphia & R. Ry. Co.,* 108 Atl. 528.

FEDERAL INCOME TAX — INCOME OF TRUST ESTATE — TRUSTEES. — Income of an estate devised to executors upon trust to pay certain annuities until death of beneficiaries and the remainder to a named charity, is not taxable in the hands of the trustees, under the federal income tax acts of 1913, 1916, and 1917, if the sum paid to each beneficiary is less in amount than the taxable limit, because the income to the estate is really income to those having beneficial interest therein, none of whom are taxable (the annuitants because the amounts paid are too small; the charity because specifically exempted) and the trustees are only the reservoir and conduit pipe through which income reaches the beneficiaries. — *Stockton* v. *Lederer,* 262 Fed. 173.

FEDERAL CORPORATION EXCISE TAX— DIVIDENDS RECEIVED BY ONE CORPORATION FROM ANOTHER CORPORATION NOT "DOING BUSINESS". — Dividends, other than stock dividends, paid in 1910, from profits, earned partly before and partly on or after January 1, 1909, of a lessor railroad corporation, not engaged in business within the meaning of the Corporation Excise Tax Act of 1909, must be included in the net income of a stockholder corporation, subject to said Act, which leases and operates the property of the corporation paying the dividend. — *United States* v. *Philadelphia, Baltimore and Washington Railroad Co.,* 262 Fed. 188.

FEDERAL CORPORATION EXCISE TAX— METHODS OF ACCOUNTING FOR RAILROADS —HELD. That under the corporation excise tax of August 5, 1909, the Commissioner of Internal Revenue has no power to prescribe a method of accounting for railroads different from that prescribed by the Interstate Commerce Commission.—*United States* v. *Chicago & Alton Railroad Co.*, U. S. D. C., No. Dist., Div. Ill., Jan. 5, 1920.

FEDERAL CORPORATION EXCISE TAX ACT —INCOME ON RECAPITALIZATION AND MERGER.—There was no income, within Corporation Excise Tax Act of Aug. 5, 1909, Sec. 38, where a corporation, pursuant to a scheme of recapitalization, organized another corporation, conveyed properties to it, constituting all its assets, received therefor its entire stock, except directors' shares, of greater par value than the price paid for the properties, distributed the shares, after formally valuing them at par, among its own stockholders, and then effected a merger between the two corporations.—*Alpha Portland Cement Co.* v. *U. S.,* 261 Fed. 339.

STATE INCOME TAX — INCOME FROM NON-RESIDENT TRUSTEES. — The question of jurisdiction so extensively litigated in property taxation is likely to be further elaborated in income tax cases. One phase arising under the Massachusetts income tax law has just been passed upon by the supreme court.

A resident of Massachusetts claimed that income derived from a non-resident trust estate created by the will of a resident of Pennsylvania, consisting of securities held by the trustee in that state, could not be taxed because such taxation would be in effect to subject property to taxation which was beyond the jurisdiction of the state of Massachusetts, in violation of the Fourteenth Amendment.

Reliance was placed upon *Union Transit Co.* v. *Kentucky,* 199 U. S. 194. While denying the applicability of that case because involving tangible personal property, and admitting that the court had in some instances treated bonds, bills and notes as having a situs where kept, the court observed that in the present case it was not dealing with the right to tax securities which had acquired a local situs but was "concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws

of another state." This looks like the abandonment of all idea of property taxation and yet the court proceeds then to discuss cases involving the situs of intangible property such as bank deposits (*Fid. & Cas. Co.* v. *Louisville,* 245 U. S. 54) and announces the general authority of the maxim *"mobilia sequunter personam",* except under "exceptional circumstances", as justifying the taxation of credits at the domicile of the owner. It proceeds then to refer to the equitable right, title and interest of the beneficiary of the trust as distinct from the legal ownership and says that "it is this property right belonging to the beneficiary, realized in the shape of income which is the subject matter of the tax under the statute of Massachusetts," and finds "nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state"; that the case presents no difference in principle from the taxation of credits evidenced by obligations of non-residents which are held taxable at the domicile of the owner (*Kirtland* v. *Hotchkiss,* 100 U. S. 491), and affirms the judgment of the Massachusetts court sustaining the tax.

The reference to these situs cases is confusing and leaves one in doubt as to the precise attitude of the court towards income taxation. It seems to leave the impression that in such a case as this, the income in question could be subjected to tax in both states by appropriate statutes, thus suggesting the old difficulty in property taxation.—*Maguire* v. *Trefry,* U. S. Sup Ct., April 26, 1920.

State Income Tax — Income Tax as Property Tax — Alabama Income Tax Invalid. — The circuit court of Dallas County has held invalid the income tax enacted by the 1919 Legislature. the opinion of circuit Judge B. M. Miller being with slight omissions as follows:

The Tax Laws of Alabama, as written, are discriminatory, or they unjustly distribute some of its burdens. Let us illustrate:

One man invests $100,000 in cash in Alabama soil—real estate, timber, coal or iron ore, parts of earth. It will be assessed at $60,000, sixty per cent of the $100,000. The taxes will total 17 mills on the dollar, or $1,020 annually on the $60,000. This is the tax if invested in country real estate —farms. If in city or town estate, $300 more annually, a grand total of $1320 on the $100,000 investment. This man contributes annually to the expense of Alabama, if he invests in country soil, $1020, and if he invests in city real estate, $1320.

Another man invests $100,000 in cash in notes secured by mortgage on the farm, coal mine, ore mine or timber or any other property, in city or country. This mortgage is recorded and this $100,000 cash so invested is taxed $150—15 cents on the $100; not annually, but only once. This is all the tax it will have to pay as long as the principal remains unpaid. The $8000 interest annually collected on his recorded mortgage of $100,000 is exempt from the income tax. He pays no state, no county, no road, no school, no municipal and no income tax on his $100,000 invested.

Another man invests $100,000 in cash in the note of his neighbor with or without collateral security and the law of Alabama tells him to pay no state, no county, no road, no school, no municipal tax; but if he collects any interest he must pay an income tax, less the exemption on his interest. If the income tax is invalid, then he pays no tax on his investment.

Is the income tax law which levies a graduated tax of 2 to 4 per cent on the gain, profit and income derived from salaries, wages or compensation for personal services or cash dividends constitutional?

Section 214 of the Constitution of Alabama reads as follows:

"The Legislature shall not have the power to levy in any one year a greater rate of taxation than 65/100th of one per centum on the value of the taxable property within this State."

Are rents, wages, salaries and cash dividends property? If paid in money, it is the highest and best kind of property. If property, then they are subject to taxation by income or direct taxation. Rent when collected, wages and salaries when earned or paid in cash, dividends earned or distributed, are property and subject to taxation. This tax must not exceed the constitutional limit of 6½ mills on the $1.00. The income tax levies from 2 to 4 per centum on the dollar, according to the amount of the net income.

Is 6½ mills on the dollar more than 2

to 4 per cent on the dollar? The Constitution authorizes 65/100th of 1 per cent, and if 65/100th of 1 per cent is less than 2 per cent, then the income tax of 2 per cent to 4 per cent on the taxable property in the form of rent paid, salaries paid, cash dividends earned, exceeds the constitutional limit.

In Alabama there can be no income tax on the taxable property of its citizens which will exceed 65 cents on the $100 or 6½ mills on the dollar. The income tax law exceeds the limit and is therefore null and void.

The taxpayers of Alabama must not be overburdened. If the Alabama family cannot live within its legitimate constitutional tax, the Legislature should cut out some of its useless and unnecessary judicial and executive offices and thereby reduce the pay-roll and make the remaining officials do the work and the state live within its lawful income.

When the majority of the Legislature, under the direction and with the approval of the Governor, place their hand on the Ark of the Covenant—the Constitution of Alabama—and press an income tax on the rents paid, wages and salaries earned and collected, and cash dividends, which this sacred instrument does not permit, it is the duty of the Courts to say: "Stop, take your hand off; you have gone too far."

It is therefore ordered, adjudged and decreed by the Court that the Demurrers of the Defendants to the Bill of Complaint be and the same are hereby overruled.—*Bennish & Meyer* v. *Union Iron Works Company,* Alabama Circuit Court, March 20, 1920.

(The state supreme court affirmed the above April 24, 1920.)

STATE INCOME TAX — GAIN ON EXCHANGE OF STOCK AS INCOME. — The Massachusetts income tax law provides that the excess of gains over losses from "purchases or sales of intangible property" shall be taxed. Complainant exchanged preferred and common stock of a corporation for common stock of a new corporation which the original corporation caused to be organized to take over all of its assets and to continue the business with the same officers and without outward change. The new corporation had no other assets than those of the original corporation.

The court held that the exchange was a "sale", or if not a strict sale, was a "purchase", and thus the transaction came within the terms of the statute; that although the property represented by the new shares was identical with that owned by the old corporation, it was nevertheless a different legal entity; the stock was different in kind; complainant had realized a gain measured by the difference in value of the shares received in the exchange; it was not a mere paper profit or an unrealized increase in value; the gain had materialized through the receiving of title to a wholly different kind of stock in a new corporation constituting new property and the tax thereon was lawful. — *Osgood* v. *Tax Commissioner,* 126 N. E. 371.

In another similar case, gain through the exchange of stock upon reorganization was held taxable, following the authority of the above decision. — *Stone* v. *Tax Commissioner,* 126 N. E. 373.

STATE INCOME TAX — DIVIDENDS FROM SURPLUS. — Under the Wisconsin income tax law, a stockholder in any corporation to whom there has been paid a sum of money under the designation of dividends, has a right to show that such payment of dividend was made out of the capital or surplus, and therefore was not taxable, instead of out of the earnings or profits accrued since January 1, 1911, which would be taxable.

Where a stockholder of a corporation exchanged his stock for stock in a holding company, and the holding company received from the corporation a so-called dividend paid out of the surplus and not out of the earnings or profits accrued after January 1, 1911, a dividend paid by the holding company resulting from such dividend from the surplus of the corporation was not "income".—*State* v. *Nygaard,* 175 N. W. 810.

STATE INCOME TAX—DIVIDENDS.—Payment pursuant to compromise, of accumulated dividends on preferred stock, amounting to $25,334.38, by paying $5,671.87 in cash, $8,152.34 (market value) in shares of preferred stock, and $3,993 (market value) in shares of common stock, a total of $17,817.21, HELD a dividend within Massachusetts Income Tax Law, the money and stock having been paid from or based upon earnings, and declared by directors

to be a "dividend". — *Wilder* v. *Trefry*, 125 N. E. 689.

FEDERAL ESTATE TAX—CONSTITUTIONALITY OF ACT—DEDUCTION OF STATE INHERITANCE TAX.—The Federal Estate Tax Act of September 8, 1916, is constitutional although the right of transfer upon death is through state probate process and although a right of renunciation may exist. State taxes on the respective shares received by beneficiaries are not deductible before computation of federal estate tax under clause allowing deduction of "charges against the estate . . . allowed by the laws of the jurisdiction," as this clause contemplates deduction only of charges directed against estate as a whole, citing T. D. 2524.—*New York Trust Co.* v. *Eisner*, U. S. D. C., So. Dist. N. Y., Jan. 1920.

FEDERAL ESTATE TAX — WIDOW'S ALLOWANCES—DEDUCTIBILITY. — A widow's rights to dower, homestead and support are derived from her marriage, under the laws of Tennessee and Arkansas and are not taken by transfer from her husband's estate but independently thereof by operation of law.

Under the Federal Estate Tax Act, Sec. 200, such rights, being neither subject to the payment of charges and the expenses of administration nor to distribution, are not a part of the gross estate.

The Tennessee law governing a widow's right to a year's support contains no provision by which such right is conditioned on actual dependency and such support is, therefore, deductible as a charge, notwithstanding the provisions of Section 203 (a) (1) of the Federal Estate Tax Act making dependency on the decedent a condition to the deduction of such allowance from the gross estate.—*Randolph* v. *Craig*, U. S. D. C. Tenn.

THE NATIONAL TAX ASSOCIATION

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ZENAS W. BLISS, Chairman Board of Tax Commissioners of Rhode Island, *Vice-President*

ALFRED E. HOLCOMB, Assistant Secretary American Telephone and Telegraph Company, *Secretary and Treasurer*

OBJECTS. The National Tax Association has no creed and conducts no propaganda. Its program is mutual education; its object is to make tax laws simpler, saner, more just and more effective. It welcomes representatives of every creed, school and interest, but its endorsement is given only to those ideas which have the unanimous approval of the voting membership at its annual conferences. With these limitations, its declared object is:

"To formulate and announce, through the deliberately expressed opinion of an Annual Conference, the best informed economic thought and administrative experience available for the correct guidance of public opinion, legislative and administrative action on all questions pertaining to taxation, and to interstate and international comity in taxation."

THE BULLETIN. The official organ of the association is issued monthly except in July, August, and September. It is intended for circulation among members and others to keep them advised on topics of current interest. Subscription price to those not members of the Association, $2.00.

VOLUMES OF PROCEEDINGS. The volumes of proceedings, covering conferences held annually beginning in the year 1907, contain a large amount of practical up-to-date comprehensive information on all phases of taxation. The volumes are cloth-bound, fully indexed, and contain approximately 500 pages each.

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LAST CALL—FAIR WARNING

There is still time in which to encourage the Treasurer and contribute to the financial success of our year's work by payment of dues. It is earnestly requested that each member ascertain whether or not his dues are paid for the year ending June 30, 1920, and if not, that he make remittance.

THE THIRTEENTH CONFERENCE

Through the energetic activities of our friend Bailey, the indications are that this conference will surpass in many respects those of the past. Comfortable quarters are assured and plans are being perfected for the pleasure and entertainment of delegates and visitors, with especial regard for the ladies, who are particularly requested to make the trip.

HEADQUARTERS

Mr. W. N. Beatty, address care Utah Power and Light Company, Salt Lake City, is very kindly assisting in the arrangements for the conference and volunteers to arrange hotel and other reservations and answer inquiries generally. He writes as follows:

"The Hotel Utah, which is to be the Conference Headquarters, has rates for rooms without bath of $2.50 and $3.00 per day and for rooms with bath $3.50 and up. The Newhouse Hotel and the New Grand Hotel have rates ranging from $3.00 to $6.00 per day. These are the principal hotels, the others being lower in proportion."

THE PROGRAM

It is hoped to make the program as helpful as possible to the states in the region visited as well as to other states. It is possible at this date to give an outline of the topics, with the speakers thus far secured.

It will be seen from the temporary outline which follows that already three Governors have kindly consented to be present and participate with addresses. This alone indicates the deep interest taken this year in the subject of taxation.

The purpose to secure a full and complete discussion of state income taxation, with the object of providing some measure of definite and concrete help towards the development of this method of taxation, is to be particularly noted.

Another subject in great need of discussion, in the light of present conditions, is that of inheritance taxes. This will be covered exhaustively.

The widespread controversy over federal taxation is assured of adequate and helpful examination at the hands of the very best talent which the country affords.

The menace of tax exemptions, the growing importance of constitutional questions, the taxation of mines are topics of immediate and pressing importance.

The distinct advance in governmental efficiency and administrative methods accomplished in Nebraska and Idaho through the personal efforts of the Governors of those states will be brought definitely before us by these Executives.

Finally, we are glad to announce this year a feature which should have a regular place on our program annually. This is the session devoted to the problems of local assessors. In the last analysis we recognize that successful taxation rests with the local assessor, the man in immediate contact with the taxpayer. It is therefore most appropriate that these officials should compare notes and secure the assistance which comes from mutual discussion of the common difficulties which arise in the everyday work of the assessor as it is presented in various states.

The tentative program as now arranged, subject to addition or revision as necessity arises, is as follows:

Preliminary Program

FIRST SESSION

Monday Evening, September 6

Organization of Conference: Opening Exercises; Address of welcome by Governor Bamberger; Responses; Annual Address of the President of the National Tax Association, Nils P. Haugen, Chairman Wisconsin Tax Commission; General Reception.

SECOND SESSION

Tuesday Morning, September 7

FIRST WESTERN STATES SESSION—UTAH, IDAHO, WYOMING

Representative officials will discuss the problems arising in these States and the remedies applied.

Governor D. W. Davis, of Idaho, will describe the Administrative Consolidation recently accomplished there, and the special topic for Wyoming will be the Taxation of Oil Properties.

THIRD SESSION

Tuesday Afternoon, September 7

1. **Recent Tax Developments in Western Canada**
   Professor Arch. B. Clark, University of Manitoba, Member Manitoba Tax Commission.
2. **Inheritance Taxes**
   a. Professor Charles W. Gerstenberg, New York University.
   b. Report of Committee of National Tax Association.
   William E. Bulknap, Louisville, Ky., *Chairman.*

FOURTH SESSION

Tuesday Evening, September 7

FIRST ROUND TABLE

FIFTH SESSION

Wednesday Morning, September 8

FEDERAL TAXATION

1. Paper by Hugh Satterlee, formerly with the Treasury Department, Author of "Regulations 45."
2. Paper by George E. Cleary, formerly Assistant to T. S. Adams while Chairman Federal Excess Profits Board.
3. Conclusions of the Tax Committee of the National Industrial Conference Board on Federal Taxes from the Standpoint of American Industry.

Presented by CHARLES A. ANDREWS, Treasurer Gorton-Pew Fisheries Company, formerly Deputy Tax Commissioner of Massachusetts.

Professor Adams is expected to be present and participate.

At noon, special pre-arranged Pipe Organ Recital in the Mormon Tabernable.

The afternoon will be devoted to a trip to the famous mine of the Utah Copper Company at Bingham.

SIXTH SESSION

Wednesday Evening, September 8

1. **Tax Exemptions.**
   a. Address by J. R. BURROW, President Kansas Bankers Association.
   b. Report of Committee of the National Tax Association.

   PROFESSOR CARL C. PLEHN, University of California, *Chairman.*
2. **Experiences with Taxation in a Constitutional Convention.**

   DOUGLAS SUTHERLAND, Member Tax Committee of the Illinois Constitutional Convention of 1920.

SEVENTH SESSION

Thursday Morning, September 9

To be held at the bathing pavilion at Saltair Beach on the Great Salt Lake.

STATE INCOME TAXATION

A draft of a Model State Income Tax Law, prepared under the direction of the Model Taxation Committee of the National Tax Association, presented and explained by HENRY H. BOND, formerly Income Tax Deputy of Massachusetts.

Paper by Professor Harley L. Lutz, of Oberlin College. Special Adviser of the Ohio Legislative Committee.

Paper by Mark Graves, Income Tax Deputy of New York.

Paper by Irving L. Shaw, Income Tax Director of Massachusetts.

Paper by Frank D. Strader, Auditor of Wisconsin Corporation Income Tax Returns.

It is expected that Professor Charles J. Bullock, Chairman of the Model Taxation Committee, will be present and participate in the discussion.

EIGHTH SESSION

Thursday Afternoon, September 9

At Saltair Beach

SECOND WESTERN STATES SESSION

Addresses by officials of Nevada, Colorado, New Mexico and Arizona.

Governor Emmet D. Boyle, of Nevada, will address the Conference.

Special Topics.—Nevada: Taxation of Express Companies.

Colorado: Supervision of Assessors and Reassessments.

New Mexico: Work of the Taxpayers' Association of New Mexico.

Arizona: Assessment of Live Stock on the Open Range.

NINTH SESSION

Thursday Evening, September 9

At Headquarters.

LOCAL ASSESSORS' SESSION

This session will be devoted to the problems of the local assessor, the man "on the firing line." The discussion will be led by representative assessors from Utah and the states immediately adjoining.

TENTH SESSION

Friday Morning, September 10

1. **A Responsible Form of Government.**
   GOVERNOR SAMUEL R. MCKELVIE, of Nebraska.
2. **The Taxation of Mines.**
   a. Appraisement and Assessment of Non-Metalliferous Mines in Utah.
      PROFESSOR WILLIAM PETERSON, Utah Agricultural College.
   b. The Taxation of Mines from the Operator's Point of View.
      Representative of the American Mining Congress.

ELEVENTH SESSION

Friday Afternoon, September 10

1. **Annual Review of Legislation of 1919 and 1920.**
   PROFESSOR O. C. LOCKHART, National Bank of Commerce, New York.
2. **Round Table Discussion.**
3. **Business Meeting of the National Tax Association.**

ADJOURNMENT

TRANSPORTATION

It is highly desirable, in the interest of a successful conference, that all should be in attendance at the opening session for organization Monday evening, September 6. It is suggested that, so far as possible, members arrange to go direct to the conference without stopovers which are likely to cause unexpected delays. After the conference, parties will naturally be organized for side trips and excursions, according to the various wishes.

Obviously those from the east will wish to arrange to make the trip in a party. To accomplish this it will be necessary to adopt some concentration point. The point most suitable is Chicago, from which several routes are available, but the most direct one appears to be via the Union Pacific System. The Overland Limited, train No. 1, leaving Chicago via the Chicago and Northwestern R. R. at 7:10 P. M. Saturday, September 4, is due to arrive at Salt Lake on Monday the 6th, at 4:30 P. M., thus in ample time for the first session.

Those who wish to adopt this suggestion may communicate with the Secretary, who will put them in touch with a Chicago representative who will make the necessary arrangements.

The arrangements for side excursions and the return will necessarily rest largely with the individual desires of the members.

As noted below, a general excursion to the Yellowstone is planned, from which point some may prefer to proceed east or west. Others may wish to return to Salt Lake and proceed east or west from there. Still others may choose to visit Zion Park in Southern Utah, the newest National Park.

Railroad tickets for those who will go direct to the conference without stop, should be bought to West Yellowstone, Wyoming via Salt Lake City and the Oregon Short Line Railroad, return trip routing to be at the option of the purchaser. A comparison of round-trip fare from the following cities to Salt Lake City and to West Yellowstone via Salt Lake City, is as follows:

From	*To Salt Lake*	*Yellowstone*
Chicago	$60	$58
St. Louis	50	59
Omaha	49	43
Kansas City	49	49
Denver	37	38
New York	109	107
Philadelphia	101	102
Pittsburgh	85	83
Washington	102	101
Boston	116	114
Detroit	74	73
Atlanta	92	92
Cincinnati	75	73

YELLOWSTONE PARK EXCURSION

A special excursion is planned, leaving Salt Lake Friday evening at 8:30 P. M., arriving at the West Yellowstone entrance at 8 A. M. After the tour of the Park persons may either return to Salt Lake and make the return trip home from that point or proceed east or west from the Gardiner entrance on the Northern Pacific or the Cody entrance on the Burlington.

The following from one of the local railroad officials may be helpful to those intending to visit the Yellowstone:

"The Park may be visited at practically no additional expense except for transportation and hotels in the Park; that is, the railroad fare to the West Yellowstone entrance is virtually the same as the summer tourist fare to Salt Lake City; in some instances possibly a trifle more, and in others even a trifle less. In order to take advantage of this very favorable arrangement, attendants at the National Tax Association meeting here should in every case purchase their tickets to the Park and return from the initial point and visit Salt Lake City either going or returning, or in both directions if desired.

The Yellowstone Park rate is a summer tourist rate and the tickets are on sale daily up until approximately September 10th and carry a return limit of October 31st. Stopovers are allowed at pleasure within the final limit. As a matter of information, the Yellowstone Park season closes September 15th; that is, September 15th is the last date that passengers may enter at West Yellowstone and make the tour of the Park.

The additional fare covering accommodations in the Park will be $54.00 via the hotel route and $45.00 via the camping route. These latter amounts cover necessary automobile transportation and respective accommodations at hotels and camps for the so-called five-day trip (4½ hotel days). Tickets including these accommodations should be purchased at initial point as part of the excursion ticket and thus avoid any unnecessary delay either in this city or at the Park entrance.

The rate for lower Pullman berth between Salt Lake City and West Yellowstone is $2.50 in each direction.

All of the above fares are the amounts for the transportation itself and, of course, are subject to government war tax of 8% additional, exclusive of accommodations in the Park.

The itinerary through the Park is approximately as follows:

1st day: Old Faithful Inn (The Geyser). 2nd day: Lake Hotel (on Yellowstone Lake). 3rd day: Grand Canyon. 4th day: Mammoth Hot Springs. 5th day: Return to West Yellowstone.

From eastern points passengers may also have the privilege of entering the Park via West Yellowstone, the western entrance, and going out via Gardiner and the Northern Pacific, or Cody and the Burlington Route.

If it is decided to take this excursion we would appreciate being advised as far in advance as possible so that we can notify the Hotel and Transportation Companies in the Park and make reservation for you."

A SUGGESTION FROM MONTANA

Mr. John Edgerton, Executive Assistant of the Montana State Board of Equalization, writes that it is possible for those going from the east to use one of the northern routes and go through the Glacier and Yellowstone National Parks, then on to Salt Lake, and return over one of the southern routes for the same fare, or nearly so, that would prevail if they go and return over the same route. He says that if some of the members will do this he will be glad to take the matter up with some of the many Montana "Boosters" and secure some attention and entertainment for them while they are in the state.

He continues: "Last year after the Governor's conference at Salt Lake, Gov. Bamberger brought his guests and their wives by autos from Salt Lake to the southern entrance of the Yellowstone Park, then through the Park to the northern entrance, where they took the Northern Pacific to

their homes. What was good enough for a lot of Governors can be none too good for those of the Association who can spend the time and money, provided the cost does not verge on the realm of seeming extravagance or profiteering.

"The large autos of the Glacier and Yellowstone Parks maintain service between the two parks, stopping over night at Helena en route. It is a wonderful trip. Again, perhaps, I am a little selfish in wanting something of this kind for myself and for Montana. As we shall not have the meeting here, perhaps we can have some of the delegates. About the only thing we will have to disappoint them in will be that we are no longer wild and woolly, have no Indians that will scalp them and we do not shoot up the town nightly."

A SUGGESTION TO SPEAKERS

A consistent attendant upon our conferences makes the following suggestion to speakers, which is given for their consideration:

"I have been in attendance at some three or four of the National Tax Conferences, and sincerely trust that I shall be able to attend future ones. I have observed that the most interesting features of the Conferences are the speeches made rather than the papers read. By this I mean, that a speaker secures much better attention than a reader, and in this day and age to secure and hold attention of audiences, the subject and treatment of same must be interesting, entertaining or instructive. I have always observed that the person reading a paper, in most instances, if not all, can make as good a speech as the paper prepared by him, and in my humble judgment it has a much greater effect if the context as well as the contents is given in a sort of an extemporaneous manner by reason of the attentive hearing given.

As an illustration, you will doubtless recall at the Des Moines Conference in 1912, the Governor of the State of Iowa, I believe, when called on to present his paper, laid it on the table and remarked, 'Here's my paper, and I am going to tell you what is in it instead of reading it to you,' and as a result he received the greatest applause of any speaker or reader present, and everybody listened with an attentive ear to what he had to say. While there were many good and great papers read at all the conferences, there is always more or less restlessness during their reading. Therefore, your self appointed committee on the rules and orders of business, beg leave to submit the following report:

That those who are to prepare their manuscripts for our next Conference, be requested to prepare them with the same prayerful carefulness for publication, as in the past, and that they be requested to either memorize them for delivery or in the language of the speaker above quoted, that they 'tell what is in them' without reading them in full."

NOTES AND NEWS ITEMS

In addition to the tax measures enacted by the 1920 session of the **New York** legislature noted in the April BULLETIN, the following have since become laws:

Chapter 191 adds two new sections—351-a and 351-b—to the personal income tax law, reimposing the tax on non-residents for 1919 income and declaring the tax a debt to the state. It also amends section 362 granting non-residents the same exemptions as residents, thus curing the defect disclosed by the supreme court's opinion; when husband and wife living together, make separate returns the exemption shall be equally divided between them.

Chapter 690 amends section 373, limiting the comptroller to three years in which to audit the return, except in the case of wilfully false returns and increasing his power to examine the taxpayer.

Chapter 691 amends sections 350, 363, 366, 370, 371, repeals 378 and adds section 373-a. These changes define a resident as one residing in the state at any time during the last six months of the year; clarify the credit allowed a non-resident subject

to income tax at his residence; revise the withholding provisions as to non-residents; make the time of filing return and payment April 15 instead of March 15, and other minor changes.

Chapter 692 repeals and re-enacts section 376 and amends sections 377 and 379. These changes relate to penalties, additional taxes and interest; to payment by fiduciaries and withholding agents and to compromise of additional taxes and interest.

Chapter 693 amends section 360, allowing deduction of all interest paid, limiting the losses deductible by a non-resident to such as relate to tangible property located in New York and allowing deduction of contributions to charitable organizations of other states.

Chapter 694 amends section 382 and is intended to allow some share of the distribution of the yield to go to villages.

Chapter 695 amends sections 359, 365 and 369, restating and clarifying the provisions as to fiduciaries.

Chapter 640 amends numerous sections of the corporation franchise tax on net income largely to clarify the administration but introducing more strict provisions as to mercantile corporations having only agencies in the state.

Chapter 644 repeals the much-hated penalty inheritance tax—section 221-b of the general Tax Law.

Chapter 765 amends section 221 modifying the disastrous effect of the operation of section 221-b upon bequests heretofore made to exempt institutions.

Chapter 646 amends Article 15 of the Tax Law known as the Investments Tax Law. This necessarily followed upon the enactment of the income tax.

Chapter 647, also a result of the income tax, adds a new section — § 4-a — to the Tax Law, exempting from property taxation all intangible property except bank stock.

Chapters 643, 645, 648 and 649 amend sections 61, 45-a, 293 and 294 of the Tax Law relating to matters of procedure.

The Governor vetoed a bill which sought to impose a tax upon freight-car companies and another which would have amended the law as to the taxation of forest lands.

Chairman Thompson of the **Mississippi** Commission advises us of the legislative proposals and enactments at the recent session. The state was confronted with a far greater demand for money than at any other session in the history of the state, the appropriations totaling $23,921,921, as compared with $9,874,813 for the 1914 session.

The Commission recommended the substitution of an income tax for the privilege license taxes, urging that income was an equitable measure for taxation and the fairest standard for taxing business, while privileges have no equitable standard and injustice is imposed by the enforcement of a tax on them. The Legislature did not follow their recommendation, but even increased the taxes on some privileges more than one hundred per cent, with an average increase of forty per cent.

They recommended that the state tax rate be fixed after the final determination of the total assessment of the entire state, following the completion of all of the assessments instead of as now, more than a year before the total assessment of the state is known, a practice which has always been followed in this state. This recommendation also was not followed, a tax of nine mills being imposed for each of the years 1920 and 1921, eighteen months before the amount of the total assessment for 1921 can be determined.

The Legislature did follow their recommendation as to when the county tax rate should be imposed by directing the County Board to impose the county tax levies at its November meeting. Before that meeting all changes in assessments will have been made, and the Board may make its levies intelligently.

It followed also the recommendation by giving the Assessor an additional month to complete and file his rolls, allowing five months instead of four, all that can be allowed without a Constitutional change.

An amendment provides that upon an arbitration of assessments the Tax Commission, instead of the County Board, will name one of the arbitrators, when the assessment involves an order of the Commission. The taxpayer names the second arbitrator, and these two, the third.

A law of much importance to non-residents was enacted which requires the Chancery Clerk and County Superintendent of Education to furnish information as to the creation of, and the metes and bounds of,

school and road districts. It is the duty of the Commission to assess the property of public service corporations for each of these districts. Without such information the performance of such duty was impossible, because they could not know of the existence of the districts or of the location of their bounds.

The statute for the taxation of national banks was not clear as to whether the tax was imposed on the bank or on its stockholders. An amendment was made to clarify this statute. The amendment imposes the tax on the stockholder and makes the bank the tax-collecting agent, giving it authority to pay the taxes for the stockholder and to withhold them out of the earnings of his shares. No change was made in the basis of assessment. It remains the value of the capital stock increased by the surplus, undivided profits and accumulations.

Some bills aimed at the Tax Commission as a result of a political campaign waged in 1919 were killed, as Honorable Lee M. Russell, its friend, was elected Governor, and many of its friends were elected to the legislature, among them Senator A. S. Kyle, the author of the law creating the Commission, and Chairman of the Finance Committee of the Senate and Honorable A. H. Stone, Chairman of the Ways and Means Committee of the House of Representatives. The House Committee reported unfavorably a bill to repeal the law providing for the Tax Commission. A bill to make the Tax Commissioners elective failed to pass the House. Another bill to give the county Board an appeal to the Chancery Court of the district in which the county is located also failed.

A bill was adopted by both branches of the Legislature, providing that the Chancery Court fix the assessment for the determination of inheritance taxes. It was submitted to the Governor for his approval. He did not approve the Act. Under the Constitution, he is prohibited from approving it until the next session. Then, within three days, he may approve it, or may veto it. If he does neither within that time, it will then become the law without his approval.

The House passed a remarkable bill providing that the assessment of personal property be used as the basis of settlement of claims for insurance. The Senate failed to adopt the bill.

Commissioner Jess of **New Jersey** writes that the Legislature now in session has not made any radical change in the existing tax laws. With the exception of an act to exempt raw materials and stocks in trade and in process of manufacture, and one to exempt "the metal contents of ores and unrefined metals owned by non-residents of New Jersey and stopped in transit through the state for the purpose of refining," the laws passed were more of a local than a general interest.

The Special Tax Commission appointed in 1919, which reported this year to the Governor and Legislature, recommended definite changes in the tax policy of the state, such as abolishing the personal property tax and substituting an income tax and a business tax; the effective control of local assessments; tenure of office for assessors, and restriction of exemptions. A bill establishing tenure of office for assessors was introduced, but failed of passage. The acts exempting stocks in trade and ores in process of refining, above referred to, were results of the Commission's investigations, but otherwise no action was taken by the Legislature on the Commission's recommendations.

The Editor is called upon to make the sad announcement of the sudden death on May 2 of Judge Fellows of the New Hampshire Tax Commission. The keen loss felt by him will be shared by many who have been privileged to know this kindly and in many ways unique personality. Nothing too good can be said of him as a man or as a public official, because we who have known him feel the weakness of words in such a connection. The Association loses a staunch friend and the tax reform movement a wise advocate in the death of Judge Fellows. Some of us will readily appreciate the apt expression of a common thought by his Associate, Judge Brown, who writes: "We miss Judge Fellows every day, not less but more. The world is less picturesque and cheerful than before he was taken away, and poorer withal."

Members will be interested to know that Judge Brown of the New Hampshire Commission is to be a candidate for Governor of that state. It goes without saying that his election is assured, as it is impossible to imagine a candidate more thoroughly competent or one who should enjoy the confidence of the entire state to such a striking degree.

PROTECTION OF MINES AGAINST UNJUST TAXATION

T. O. McGRATH
Shattuck Arizona Copper Company

The equitable taxation of mines was an unsolved problem that had perplexed the minds of state and county and mine officials many years before the enactment of the present federal tax laws which now further complicate this problem and add to the unequal tax burden that had already been carried by the mining industry.

Probably one reason why this problem of mine taxation has not been satisfactorily solved has been the lack of understanding of wherein the business of mining differs from that of other industries and failure to recognize that to endeavor to apply to mines a method of taxation that does not make allowances for this difference is bound to work a hardship upon the mines.

TAXES PAID BY MINES

The taxes paid by mines consist of two groups, viz.: federal taxes and state and county taxes. The federal taxes consist of capital stock tax, income tax and excess profits tax.

A capital stock tax is paid by all mines whose capital is in excess of $5,000, which tax is more or less of a nominal one.

The federal income tax is paid by mines upon the total amount of the net return for each year, regardless of whether or not the mine has proved its investment.

The excess profits tax is paid by all mines whose income is in excess of 8% of their invested capital for any one year, regardless of whether or not the value of the property investment has been proven or that any income had been received in previous years.

All mines pay state and county taxes to the state and county in which the property is situated regardless of whether or not the mine is a prospect or a proven property.

The state and county taxes are based upon the assessed value of the mining property and the improvements, and the rate of tax is determined by the amount that must be raised to take care of the state and county expense. Therefore there can be no complaint made by the mines as to the tax rate that is not applicable to other industries, as this rate can be reduced only by reducing the state and county expense, or by building up and enlarging the industries of the state and counties. However, the question as to the fairness of the valuation placed upon mines can be raised and the method of determining this value can be investigated to ascertain whether or not the valuation assessed is fair and equitable in comparison with the valuation placed upon other property.

The failure of the federal government to recognize the inherent differences of mining as compared with other business has resulted in making the present income and excess profits taxes work a hardship upon mining, and if the federal tax laws and the Treasury Department's regulations governing the interpretation of these laws are not amended, there will result a slowing-up in the future development of mines. As mining is a wasting industry, any let-up in new development will eventually result in a gradual reduction in the mineral production of the United States.

While it is the belief of many that no mine in the course of development should pay a capital stock tax until the value of the mining investment has been proven, nevertheless, as the capital stock of most development mines does not exceed to any great extent the amount exempted from taxation, the amount of such payments by development mines is not sufficient to warrant any considerable comment.

PROTECTION AGAINST UNJUST FEDERAL INCOME TAXES

The injustice of the present federal income taxes is due to the failure of the Treasury Department's Regulations to properly define what is income from mines, making all returns received from sale of metals, etc., in excess of the operating expense, income subject to income taxes.

The law and the Treasury Department's Regulations do not make any distinction between net returns from a prospect and income from a proven mine. For instance, it is customary for the prospect mines, or mines in the course of development, to ship all the commercial ore taken out in the development work, in order to help carry expense of development, and when the prices of metals are above the average, to ship, if possible, all the ore that was discovered by development work, regardless of whether or not there had been discovered total ore reserves of a net value in excess of the actual investment sufficient to insure the return of investment, or as much thereof as possible, when times are favorable.

Therefore it often happens that development mines that have not yet proven their investment will show at the end of a year a large surplus above the regular development expense. This is nothing more than a liquidation of the investment which has not yet been proven and which is as a rule reinvested in further development work or equipment.

However, according to the requirements of the income tax law and regulations of the Treasury Department, there will have to be entered against such a surplus a depreciation and depletion charge, and an income tax paid on the remainder, which is considered income, regardless of the fact that there can be no such thing as either depletion or income until the investment has been proven.

Therefore to pay such a tax before the value of the investment is proven is simply paying a tax upon a liquidation of capital. Should development work in the future fail to discover ore of a net value in excess of the original investment, such tax payments will prevent the return of the original investment to the investors and reduce the amount that can be reinvested in further development work.

To cure this injustice there should be a provision in the Treasury Department's Regulations defining income from mines, so as to protect the development mine from paying an income tax on any liquidation of its capital invested.

PROTECTION AGAINST UNJUST EXCESS PROFITS TAXES

As an excess profits tax must be paid on all income for any one year in excess of 8% of invested capital, the income of a proven mine which has passed from the development stage into the income-earning stage must bear this excess profits tax on any portion of its first year's income that is in excess of 8% of the invested capital, regardless of the fact that the business may have labored for years, without any return upon its investment, to bring the property to the income-earning stage.

The average time required to bring the prospect mines to the income-earning stage is approximately six years, during which time no return is received on the investment. However, should a proven mine wish to force its production during the first years of income-earning operations in order to take advantage of high metal prices and to insure its stockholders an immediate income return sufficient to give 8% not only for the present year but for the many preceding years when no return was received, it will be able to do so only by first paying a graduated excess profits tax on all net income for each year above the stipulated exemption.

It is plain to anyone who has considered this subject that to require the income from a proven mine to bear an excess profits tax before there shall have been returned to the stockholders at least 8% per year on the average invested capital for each year that it has been invested in the business is unfair and unjust; also that the amount that the receipts may exceed the expenses of any development mine should be free of all income and excess profits taxes until the net value of all ore discovered is in excess of the amount of the investment, otherwise the development mine has no assurance that it will not have to pay federal taxes upon a return of capital.

STATE AND COUNTY TAXES

At the present time there is no uniformity in the methods of states and counties to determine mine valuation for the pur-

pose of taxation. Also, as a rule the states and counties have failed to recognize that the nature of the mining business is different from that of other business, due probably to the great difficulty in determining the true value of a mine. There has resulted generally excessive state and county taxes.

Many methods of valuation of property within the states and counties for the purpose of taxation have been tried. The present practice most favored is to endeavor to determine as near as possible the true value.

So far no method used in determining mine valuation for purpose of state and county taxation has been satisfactory to all concerned, due to the fact that the determination of the actual mine property value is a matter of great difficulty and uncertainty, requiring expert knowledge and the use of many estimates and approximations which may not prove to be correct in the end. Therefore some states, in order to avoid a laborious process of valuation, have adopted the simple method of capitalizing the earnings of proven mines and assessing unproven mines a nominal value per acre of mineral ground, the equipment and personal property of both classes of mines being assessed at cost less a reasonable allowance for depreciation.

I am of the opinion that such a method could be made uniform for all states and counties and would give satisfactory results. When such a method is used the mines are grouped into two classes of productive mines and non-productive mines. The amount of taxes received from non-productive mines is small, which of course meets with the general approval of the owners of such mines. However, in the case of productive mines, the value of the mineral ground is determined by taking for the past five years the average operating income before deduction is made for depletion and depreciation and capitalizing this average at a certain percentage, according to the assured life of each mine, as shown by ore reserves, etc., the mines being grouped as follows:

First: Mines whose ore reserves do not show evidence of exhaustion.

Second: Mines whose ore reserves show evidence of exhaustion.

Third: All producing mines with irregular output.

The income of the first group is capitalized at a figure supposed to represent a fair profit for the mining business as compared with other industries in the state. The income of the second group is capitalized at a higher figure, while the income of the third group is capitalized at a still higher figure, all determined with the endeavor to obtain what is fair.

Such a system of taxing non-productive and productive mines has been in effect for a number of years in the state of Arizona, and while entirely satisfactory to the state and counties and to the majority of non-productive mines, it has resulted in making the producing mines pay about 60% of the state and county taxes, and has given other lines of industry a lower tax rate than that of other states of much larger population and less state expense than that of Arizona.

While such a method is no doubt based upon the right principles and has the advantage of simplicity and ease of operation, it has its disadvantages as well. On account of the difficulty in the past of obtaining net earnings, the gross earnings have been taken and an arbitrary rate of capitalization has been used instead of a return equal to that earned by successful concerns in other lines of business. This has resulted in an excessive tax on the producing mines of the state.

This system was possibly the best that could be obtained at the time it was worked out and would no doubt be as near an ideal system as could be obtained if the following modifications were adopted:

First: There should be included in the productive group only those mines whose net value of the total ore discoveries, whether mined or in place, exceed the amount of the actual investment in mining claims, equipment and development expense.

Second: All mines that have not proven their investment, regardless of whether or not they are marketing ore from development work or are mining all development ore discovered, should be included in the non-productive groups and the value of their mine property so assessed.

Third: In the case of productive mines, instead of using the average operating income before deduction for depletion and depreciation as is now done, the net income that is accepted by the Federal Govern-

ment as income subject to income taxes should be used.

Fourth: In the case of productive mines the average net income should be capitalized, for the first group, at a figure not less than that obtained by dividing the total assessed value of stock of successful commercial enterprises into the amount of their total net income. In no case, however, should the value exceed the present worth of the ore in place as determined by methods approved by the federal Government.

The suggested modifications 1 and 2, as to regrouping of the mines, could be easily accepted, would not result in any great difference in the state and county taxes, but would be of great advantage to those engaged in the development of mines.

Suggestion 3, to use net income instead of gross income, could also be easily adopted, provided the development mine is eliminated from the producing group and the same amount of depreciation and depletion as allowed by the Government, is deducted by the state.

The reason for the present unfairness in the state and county taxation of mines, when the average income is capitalized to determine valuation, is due to the capitalizing of the average earnings at a figure lower than that obtained in other lines of business. As an illustration, it is the practice of most merchants so to gauge their selling prices as to give an average net income of from 5% to 10% of the sales, after deduction of all expense, including cost of stock and depreciation of equipment. With the average successful merchant, the turnover of stock is from two to four times per year, or an average, say, of 7% on sales and an average turnover of the investment of three, making net earning of about 21% on the actual investment, on which investment they are taxed.

In comparison with this, under the Arizona system the average earnings of the first group of mines, which is taken before any deduction is made for the cost of stock and depreciation of equipment, is capitalized at 15%.

I am of the opinion that if the present Arizona system of determining valuation of mines could be modified to meet the above suggestions, there would be obtained an ideal system of valuation for state and county taxation of mines, that could be made uniform for all states and counties.

VALUATION OF MINES: DISCOVERY, ETC.

In order that it may be known when a discovery of a mine is made, also in order that the requirements of the present federal tax law as to the determination of the market value of mines as of March 1st, 1913, in case of purchase prior to that date, may be ascertained, definite methods of valuation should be approved by the Treasury Department, which would also help to clear up the matter of state valuation for the purpose of taxation.

In order to decide when a mine has been discovered or when the net value of the total ore discoveries exceed the investment there must be determined the following facts:

(a) The total dry tonnage of commercial ore that has been discovered.

(b) The commercial mineral contents of discovered ore.

(c) The recoverable and marketable contents of the ore.

(d) The cost of recovery and of marketing the recoverable contents.

(e) The prices to be received for the recoverable contents.

These facts must be ascertained before it can be known whether or not a discovery of a mine has been made and definite methods of ascertaining these facts should be decided upon by the Treasury Department, especially in determining the ore reserves and what metal prices are to be used.

To ascertain the value of a mine as of March 1st, 1913, or the present worth as of any certain date, requires the use of two additional factors, as follows:

(f) The time required to mine and market the ore.

(g) The rate of interest to be allowed in determining the present worth of the mine as of any certain date.

These factors would no doubt be just as difficult of determination as factors "a" and "e". However, they are matters that must be settled before depletion can be satisfactorily determined for those mines that had acquired their properties prior to March 1st, 1913.

The determination of the present worth of a mine as of a certain date must be an

estimation at best, due to the fact that it is an endeavor to forecast what will happen in the future in the way of fluctuations in the price of labor, materials and metals and ability to operate continuously, etc. Nevertheless, some equitable method of determining present worth of the mineral deposits of mines should be adopted immediately by the federal Government.

SUMMARY

To summarize the matters that have been covered in this article concerning state, county and federal taxes of mines, I will say that the mines should unite for their mutual benefit in an endeavor to obtain the following:

First: That the state and federal Governments should define a proven mine or "Discovery of a Mine" as the discovery of commercial minerals, whether mined or in place, of a total net value in excess of the total amount of the investment in mining claims, development expense and equipment.

Second: That the state and federal Governments should decide upon a definite method of determining the net value of the ore discovered, as well as definite methods of ascertaining the present worth or market value of a mine as of a certain date.

Third: That the Treasury Department's Regulations should define income from mines subject to the income tax, as income from proven mines only.

Fourth: That the Treasury Department's Regulations should define income from mines subject to excess profits taxes as that amount of each year's income that is left after the average investment in the business has earned at least 8% per annum for each year of the investment, i. e. the yearly income from mining operations should not be subject to excess profits tax except as it is in excess of an amount necessary to give an earning of 8% per annum on the average investment to date.

Fifth: That for the purpose of state and county taxes, endeavor should be made to obtain a uniform grouping of mines of each state, as follows:

(a) Non-productive and non-income-earning properties.
(b) Producing and income-earning properties.

Each of these groups should be divided into sufficient classes to enable the placing of a fair valuation on each class.

Sixth: That for the purpose of state and county taxation, a nominal assessed value per acre of all non-productive and non-income-earning mines should be obtained, and also a fair valuation of productive and income-earning mines by means of capitalizing the actual net income as reported to the federal Government, at a rate for the first group of productive mines that is not less than a rate obtained by dividing the total income by the total assessed value reported to the state for the purpose of taxation, by successful commercial firms, the rates for the other classes of productive mines to be as much higher than the first class as fairness and justice will allow.

Seventh: That to take care of the extra hazards and risks involved in bringing the mine to the proven stage, as well as those that must continually be taken in order to insure the continuation of the business, due to the fact that mining is a wasting industry, either a higher rate of income exemption from the excess profits tax should be granted or there should be allowed as "Reserve for Hazards" an amount not to exceed 10% of the yearly expense of mining.

In order to accomplish the objects as above set forth there should be a campaign of education to acquaint the general public and tax law-making bodies of the inherent difference between mining and other lines of business.

WHEREIN MINING DIFFERS FROM OTHER INDUSTRIES

Almost everyone who is acquainted with mining knows that the hazard and risk is much greater than in other lines. However, it is doubtful whether any except those who have made it a study could tell exactly wherein mining differs from other industries. The principal differences are as follows:

First: The initial investment in mining claims, development and equipment must be proven by the discovery of commercial ore of a net value equal to the amount of investment before the investor can be reasonably assured of the return of his capital, which will then be subject only

to the fluctuations in the metal, material and labor markets.

In other lines of business the amount of investment in merchandise, raw materials, property, etc., has a certain marketable value from the moment of purchase, and can be disposed of at any time thereafter, for the amount of capital invested therein, plus a reasonable profit, subject to fluctuations in the material and labor markets and competition.

Second: The income of a mine is determined principally by the amount that the net value of the ore discovered is in excess of the investment in mining claims, development and equipment, while the income of other industries is determined by the price at which the article can be sold above the cost of production, and the quickness with which the investment is turned.

Third: It takes from three to seven years as a rule, after necessary development equipment has been installed on a mineral property, to prove the value of the property, during which time the investor stands to lose not only the interest on his money, but all or part of his principal, depending upon the amount of the net value of the commercial ore, if any, that may be discovered. Other lines of industry have the value of their investment established immediately upon the acquisition of their stock and are able, as soon as equipment necessary to handle the business can be installed, to offer their product for sale at as high a figure above the investment cost as competition and the law of supply and demand, etc., will allow.

Fourth: Mining, in taking the risk involved in proving its initial investment as well as being deprived of any return on its investment during this period, being a wasting industry, must obtain a higher rate of income, after the mine has been proven to be income-earning property, than is obtained by other business in order to insure, before exhaustion, the same average return of income as other lines of industry.

Fifth: To operate a producing mine requires extraction of ore and sale of its recoverable contents, which eventually exhausts the property of all commercial contents. Therefore to continue the life of the business and to keep the organization intact, requires that the same risk and uncertainty and delay in return on investment as in the beginning of the business must again be taken in the case of new properties before the exhaustion of each proven property. In the case of other lines of business that have an established trade it is simply a question of reinvesting the liquidated capital that was invested in stock, in the purchase of new stock of finished or raw materials, which, in the case of successful commercial enterprises, is done three or more times during each year's operation, without any hazard whatsoever.

In addition to the main points set forth above, mines are subject to accidents by fire, floods and cave-ins, of greater magnitude than is the case in other lines of business; this at times results in an operating loss even after the mine has been proven to be an income-earning property, against which there is no insurance except in the case of accident to employees.

A proven property has not only to assume the risks and uncertainties above specified, which are not assumed by other lines of business, but must also bear the risks common to all business, of fluctuations in the price of materials, wages of labor, and cost of supplies, as well as strikes and acts of nature, which at times may result in a proven mine operating at a loss for any one period.

TIMBER TAXATION

HON. W. D. VEASEY
Laconia, N. H.

An address before the Association of New Hampshire Assessors, December 19, 1918

The subject of taxation of timber and timber land and the question of whether it should be taxed at its full value, or otherwise, has been discussed by a great many people, at constitutional conventions, before the legislature, and at public hearings. It is a question that has about as many different views as there are different people.

It is quite evident that the subject cannot be satisfactorily disposed of at a constitutional convention. Those interested in growing timber naturally ask for and want exemptions for a period of time at least; those not interested in timber lands feel that if their property is to be taxed at its full value, that timber lands, or growing sprout land, as it is termed, should be taxed likewise. There are some good reasons for this view, but there are some good reasons why the timber and sprout lands at least should not be taxed at full value.

The best way to illustrate the subject is by comparison. Take a farm, for instance, in poor state of cultivation, producing hardly anything, — that particular farm should be taxed on the basis of its producing value. Another farm of the same acreage in a high state of cultivation would be assessed for perhaps three hundred or four hundred per cent more than the adjoining first-mentioned farm. The reason is because it has possibilities and is actually producing at a profit to its owner.

If the same rule is applied to timber lands and they are taxed according to their producing value, without taking into consideration the actual crop grown thereon for a period of years or to a time when the crop itself has become of material value, then and not until then should the crop or standing timber be taxed.

Pine land, for instance, produces lumber that shows a growth of about one-eighth inch on a side, or one-quarter inch a year in diameter. A tree that has grown to be 6″ in diameter, one-half its length, would require twenty-four years of time. That tree would measure 4 cu. ft. or 40 board ft., assuming that it was 30 ft. high. Until this growth has reached a size of at least 6″ in diameter, one-half its length, it has practically no value for any purpose other than to grow.

It will be noticed that there has been twenty-four years of idle time in producing a growth upon a tract of land that would average 6″ in diameter, one-half its length.

If trees should stand 100 to the acre, this particular piece of land in question would produce 400 M. ft. in twenty-four years. At an average price of $6.00 per M., an acre of this land would only be worth $24.00 for logging purposes at the end of twenty-four years. A lot containing 100 acres would be worth $2,400. If this lot of pine were to be taxed at its full value, the owner is more than likely to come to the conclusion that he has paid a tax upon this land for twenty-four years and would want to convert it into money.

If, on the other hand, it had cost but a very small sum to carry this growth, the owner would realize that by carrying it twenty-four years more, the tree would be 12″ in diameter, one-half its length and 60′ tall, and would measure 34 cu. ft. or 340 board ft., and he would be willing to hold the lot that much longer, as his tree would increase from 4 cu. ft. to 34 cu. ft. in the next twenty-four years, that is, the first twenty-four years he only grew on his land of 100 acres 400 M. ft. of lumber, whereas in the next twenty-four years he would have 3,400,000 ft., worth $10.00 per M., or instead of $6.00, $34,000 worth of property at the end of forty-eight years. I am assuming a good piece of timber, better than the average, only by way of illustration.

The reason for this extraordinary growth and increase in value is from the fact that the larger the tree, the bigger the proportion of accumulative growth per year in that tree. Anyone not familiar with a caliper rule would be very much surprised to see how fast the tree increases in value as its diameter increases. A tree 4″ in diameter, 16′ long, would show 1 ft. upon the caliper rule, yet it would take about twenty years to grow it. Leave that same tree growing twenty years more and it will measure 150 board ft. A tree growing in the same proportions as the ones just mentioned, 96 years old, would be 24″ in diameter, one-half its length, would be 90′ tall and measure 198 cu. ft. or 1980 board ft.

It is very evident that a small growth of young pine or any other kind of lumber is of very small value and yields its owner a very small amount per year until it has reached an age of twenty to twenty-five years; therefore it should be taxed at a nominal figure.

It has been urged quite seriously that a constitutional amendment should be passed exemting entirely from taxation young growth of this nature, for a period of years, and then that the timber should be taxed at its true value from the end of that period on. Others urge that the question

of taxation should be left until the timber has been sold and removed, when the purchaser or owner at the time of its conversion should pay a percentage of its true value to the town in a lump sum.

I have had an impression that a law could be passed whereby after a period of twenty years, or at a time when the standing growth could be converted into box-board lumber, the lot should be assessed and a charge made on the town's books against the lot, the same as though a tax was to be paid, that this charge should be made from year to year and that the town should have a lien upon the lot for the aggregate amount of the different charges until such a time as the owner should see fit to dispose of said property and that the amount of the charges should be paid to the town at the cutting of the same. In this way the owner and purchaser could both refer to the town records and know how much tax there was to be paid upon the lot. The owner of the property could refer to this record from time to time and make up his mind when it would be to his advantage to dispose of his lot. The real object of this method would be to make it of interest to the owner to retain the lot as long as possible. The town would receive more benefit in the way of taxation the longer the lot was left standing, the owner would receive more benefit from his lot because it increases so much faster in quantity and quality after it has become 10″ or 12″ in diameter than he did before, and the purchaser would receive a better class of lumber.

I believe the time will come when the owner of standing timber will be prevented from cutting the same until it has reached a substantial growth and perhaps be obliged to re-set as many trees of the same kind as he cuts from his land. Unless some such arrangement can be made by the constitutional convention, I believe it will be possible and feasible for the tax commission to adopt some kind of a universal rule for the various assessors and selectmen of the state in assessing the tax upon the various kinds and growths of timber. Some rule along this line could be adopted.

Of course, the whole matter of just taxation is based upon the judgment and experience of the various assessors. It is to be expected that they will make some errors, that they will get some pieces of property assessed too high and others too low, but on the whole they can get at the true value very closely through their own experience and the experience of experts which the town has the right to employ.

I believe that the full valuation theory is really the only one that is just and fair and that every effort should be made to arrive at the true value of every piece of property whatever its kind and wherever situated, and assess the property accordingly.

There are thousands of owners of property throughout the state who are ignorant of the value of their own property. It is a benefit to them to have the assessors place a value upon their property of what it is actually worth and it works no hardship in the way of taxation, providing every other person in the town and state is taxed likewise. How often we hear of some farmer who has raised a piece of timber, who has not been on to his wood lot for years, who has been asked to make a price upon his timber or his farm, and has placed a value upon the same for one-quarter or one-half its true value and afterwards has found out his mistake, which has cost him no end of worry and disappointment, perhaps to such an extent that it has entirely discouraged him. This would not happen if his property had been properly examined and assessed at its full value by the town assessors.

During the last few years it has become customary for the assessors to employ some outside expert to assist them to come to a conclusion as to the fair valuation of certain tracts of land. Every town should appropriate a sum of money sufficient to procure the services, once in five or ten years, of an expert timber estimator, that their assessors may keep posted and familiar with the valuation of all of the pieces of timber land in their town. The tax assessors should examine the reports very carefully and familiarize themselves with the nature of the growth, location, etc., so that from year to year they may make such additions as the nature of the growth would require or permit. Some advocate making a fixed addition or percentage of growth to each lot yearly. This rule is not just, as some lots grow much faster than others. It is absolutely necessary for the assessors to become familiar with the growth in their towns in order to treat every owner justly;

the assessors should not be governed by offers made for timber any more than they should for other pieces of property. A man may have some reason why he wishes to retain his timber the same as he would why he might want to retain the house he lives in, and refuse an offer of twice what it is worth, or he might be willing to sell his piece of timber land for one-half what it is actually worth. The assessors should not be governed in any way by his views unless they are correct. I maintain that all assessors should be very lenient in the assessment of small growth and that the tax commission should stand back of this movement, and that all matured timber should be taxed at its full value, which means full cut, full price and in consideration of its quality, taking into consideration of course its location, nature of the ground on which it stands, distance from railroads, etc.

By adopting some such method, the same results can be obtained as are contemplated by a change of the constitution, with the exception of an absolute exemption for a period of years.

A different rule should be applied to hardwood growth, that is, the method would be the same, but the duration of time for nominal taxation should be extended over a far greater number of years. There is quite a question whether the owners of hardwood timber lands ever receive enough to pay the taxes, to say nothing about the interest upon the money they have invested in the land. It is a known fact that old-growth hardwood timber lands seldom ever produce over 4 M. ft. per acre, the stumpage is figured at about $2.00 per M. This would yield $8.00 per acre. It takes about 100 years to produce hardwood of size sufficient to make first class interior finish. It is very evident that the owner of this class of timber lands is losing money even if his lands are not taxed at all.

It is a question that requires a great deal of study and consideration. No two pieces of land can be treated exactly alike; it is almost entirely a question of judgment and knowledge on the part of the assessors. They should be very cautious and give the owner the benefit of all the doubts. It is not good business to so assess timber lands as to cause their premature denudation. There is a strong impression among all of the assessors that I have become acquainted with, that they must go the limit in order to satisfy the tax commission of the state. I think this is a wrong impression, judging from my knowledge of the personnel of the commission. This could be eliminated by an adoption of certain rules with explanations, that would be well within the law, forwarded to all the assessors of the state by the commission, if they should conclude after examination that this theory is workable and practicable.

THE IMPORTANCE OF UNIFICATION OF INHERITANCE TAX LAWS

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An address at the New York State Tax Conference

The income tax has recently entirely overshadowed other forms of taxes in the public mind. I don't need to go into a discussion of the reasons. The ease with which a state can superimpose a state income tax on the federal income tax is now apparent to all of us who this year mailed a yellow sheet to 120 Broadway for Mr. Travis as well as the more formidable white sheet to the Customs House for Mr. Edwards. The State income tax was fortunately started this year when the reduction in the rate of the normal federal income tax from 12 per cent to 8 per cent could be taken as a solace by the taxpayer for his new tax of three per cent, or less, to the State. But we must not close our eyes to the fact that gradually the taxpayer is going to wake up to the fact that residence, heretofore recognized as an important consideration in the retrospect of one who is supposed to be dwelling in the

kingdom of heaven, is also an important consideration in the prospect of the citizen facing the options of paying income taxes at different rates in different states or of paying an income tax if he lives in one state or of paying none if he lives in another.

Men of means have sometimes been careless about locating their domiciles, when the only difficulty involved was the payment of an inheritance tax by their heirs or estates. Indeed, a brief survey of many opinions on the question of residence shows that there has seemed to be some virtue attached to the phrase, "resident of Vermont," or of some other state, appended to the name of the testator in his last will and testament, just as though such a phrase could have very much to do with establishing the intent necessary to change a residence into a domicile.

But the income tax is going to educate men up to the necessity of seeking out the state that is easy in the matter of taxes. The need for escaping present income taxes will be more pressing, more appealing than the need for setting the house in order to clear the estate from inheritance taxes. In the single act of locating a domicile for the purpose of fixing the taxpayer's relation to the state income taxes, he unwittingly, perhaps, accomplishes the twofold purpose of dodging an income tax for himself and an inheritance tax for his estate. I deem it important, then, that in the midst of all our discussion of income taxes we shall not lose sight of the effect which the levying of income taxes may have on the revenues of the state through the incentive the income tax may give to the taxpayer to change his domicile and thus escape not only the income tax but the inheritance tax as well. Let me add that this fear of mine is not mere imagination. Only very recently it was claimed by heirs that their testator had an established residence in Massachusetts. The fact that the decedent had filed his federal income tax return in New York City was held by a New York court to be conclusive evidence of residence in New York. Inheritance taxes will follow income taxes just as certainly as trade follows the flag.

In reading the report of the Committee appointed by the National Tax Association to prepare a plan of a Model System of State and Local Taxation, I was sorry to see that the place of inheritance taxes in a uniform system had not been considered. I say I was sorry because I believe the subject of inheritance taxes is just as much in need of classification and standardization as any of the other taxes. Several years ago it was pointed out that an examination of the cases reported in one of our law digests showed that about twenty-five per cent of the total litigation concerning taxes is attributable to the inheritance tax laws. The importance of inheritance taxes is shown not only in this mass of litigation — only a small part of the cost of which, by the way, finds its way into the reports of the cost of the administration of the law—but by the fact that forty-five of our forty-eight sovereign states have adopted a tax on decedents' estates in some form and that all but ten of them tax transfers of stock of domestic corporations, though the decedent was a non-resident of the state. On account of the complexity of the problems involved in inter-state inheritance taxation as well as on account of their growing importance as sources of revenue, I am sorry that the Model System did not lay down some guiding principles.

I shall not attempt to rush in where the National Tax Association committee feared to tread. There are, however, a few aspects of this question that I should like to touch upon, stating problems rather than suggesting solutions.

In the first place, the instability of our inheritance tax laws is cause for complaint. In the single year 1919 there were statutory changes in 19 states as well as the change in the federal estate tax law. Our own law has been amended over 40 times since its enactment in 1885. The fact that business in the United States is organized largely on the corporate basis; the fact that corporations make wide appeals for capital, and the fact that good investment policy teaches the wisdom of scattering investments geographically as well as in various enterprises, all conspire to place the citizen of any state largely under the control of the laws of all the states. Not only in choosing domicile, then, must the taxpayer study the tax laws, but in choosing his investments he must give weight to the tax burdens the different available investments entail. Anyone who is familiar with bond circulars knows that

the inheritance tax law of the state of incorporation is as important a consideration as is the element of income, or of marketability or any other advertised investment feature. The taxpayer has a right to demand that he be permitted to make his investments without examining from year to year the statutes of some forty-five jurisdictions. The encouragement of thrift under present chaotic conditions must seem to many a hopeless task. I make bold to say, even in this day and trembling hour, that though a man's house has ceased to be his castle, the state cannot claim it as a laboratory in which to conduct its fiscal experiments.

In the second place, even if there were little change from year to year in the inheritance tax laws, the mere fact of divergence in rates and often in incidence, makes difficult the task of carrying on ordinary business with some regard to the future. Investors have come to the point where they ask about the liability to inheritance taxation of every investment that is offered them. One insurance company has published a digest of interstate inheritance tax laws, and one investment house has, to my knowledge, engaged the services of a specialist to prepare for its customers a pamphlet on the subject of the relation of inheritance taxes to investment, including a digest of the essential parts of the inheritance tax laws. A uniform law, whether it be a uniform law adopted voluntarily by the states or a single law adopted by the Federal Government would simplify the investors' problems.

A third difficulty that the inheritance tax problem presents is the danger of the dissipation of productive capital. Almost every insurance agent selling life insurance can give at least part of the argument on this point. If the inheritance tax bears so heavily on an estate that a large part of it must be converted into cash to pay the tax, there is danger that the income-producing entity of which the estate may consist will be disrupted, to the detriment not only of those interested in the estate directly but to society as well. For though our economic faith may run to extreme individualism or to complete socialism, we still can agree that the disruption of large-scale production is an economic loss. The insurance business has grown tremendously, and partly because life insurance is used to provide the means for paying inheritance taxes that might otherwise ruin business organizations.

This danger really may arise in one of two ways: either an estate may fall under the concurrent burden of several inheritance taxes imposed by the federal government and by several states, or it may be subject to successive inheritance taxes imposed by one or more jurisdictions at the death of several holders who die in rapid succession. The danger of this latter contingency, namely, that the same property may belong successively to, say, five holders who die, one after another, within a short time is recognized by the Federal Estate Tax, which provides in effect that the same property cannot be taxed twice within five years. To get the states to agree to such a provision is probably impossible. And even if the several states did enact such a provision, excluding from inheritance taxes property that had recently been taxed, the provision undoubtedly would be made to apply only to property that had been taxed by the same state. If therefore the ownership of property should pass in rapid succession from a resident of one state to a resident of another state, and so on, we should pretty soon find the estate practically annihilated. I say practically annihilated, for I appreciate that successive taxes, each taking only a percentage of what was left after the previous tax had been paid, could never entirely exhaust a property. But from a practical standpoint you don't have to appropriate every drop of property to exterminate entirely the value of what is left. There is a fraction of an estate beyond which you cannot go in subtracting wealth without causing the estate to fly apart like the Prince Rupert drops that are made by dropping molten glass into water. But the danger does not arise from successive levies alone. It arises from the concurrent imposition of taxes on the same property at the same time by several taxing jurisdictions. At the present time there is alwas a double burden, that of the state and that of the Federal Government. And if, for example, all of the decedents' property should have a definite physical situs in one state, and the decedent should have his residence in another state there would undoubtedly be triple taxation—taxation that might approximate 50 per cent of the prin-

cipal of the estate. Indeed, an estate may pay inheritance taxes on the same wealth in five jurisdictions, i. e., four states and the federal government.

A still further difficulty in our interstate system of inheritance taxes has already been hinted at, the expense, as well as the delay in settling estates. The judge-made law of interstate inheritance taxation is growing apace with the statute law. This judge-made law I am afraid is clouding the general principles with countless single instances that serve the purpose of pointing the way to evasion as well as the purpose of clarifying the law. I have had some training in the law and have accustomed myself to rather close reasoning, but I must confess that the opinions of the United States Supreme Court alone are becoming bewildering. For example, I have not yet been able to reconcile the two following pronouncements made by that Court, one on October 27 last in upholding the "ratio formula" contained in the New Jersey inheritance tax law, and the other holding unconstitutional the lack of a non-resident exemption clause in our own income tax. In the one case the Court said: "The alleged discrimination . . . so far as privileges and immunities are concerned, is not strictly applicable to this statute because the difference in the method of taxation rests upon residence and not upon citizenship." (*Maxwell* vs. *Bugbee*, 250 U. S. 525.) In the New York case the same court within five months said: "A general taxing scheme [what else is the New Jersey inheritance tax] if it discriminates against all non-residents, [and that is what the New Jersey law does] has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which citizens are entitled." (*Travis* v. *Yale & Towne Mfg. Co.*, not yet reported.)

The fact is that the attempt to draw distinctions between state lines and between state and federal lines is placing a well-nigh intolerable burden on the Supreme Court, a burden which is requiring a preciseness of reasoning, and sometimes the erection of a hair-splitting rule, that is altogether revolting to the man who insists upon standing out in the clear light of common sense and upon judging of rights and obligations, as between citizens and the state, as well as between citizen and citizen and between state and state, on the simple basis of what is given and what is received.

It may seem sensible to the lawyer to make distinctions as Professor Powell does in his series of articles on Extra-Territorial Inheritance Taxation just beginning in the *Columbia Law Review*, as to the nature of a tax in one place and in another place, calling it in one jurisdiction a tax on the privilege of doing business and in another a tax on property, but to the matter-of-fact person, such distinctions are but sops which logic throws to the overstrained judicial conscience. Blackstone tells us that the Roman tyrant Caligula posted his new laws at the top of the columns supporting the roof of one of the temples. When his enemies, wholly ignorant of the law, were brought to court, their complaint that they did not know of the law was answered by the retort, the laws are posted on the temple. Now, I claim that the difference between putting a law at the top of a column and burying it beneath a perfect landslide of judge-made theories or hiding it within a wilderness of what to the matter-of-fact seems contradictory interpretations, I say the difference between the cunning of the tyrant and the ponderousness of our forty-five-fold system of legislative and judicial experiment is so slight as to justify the matter-of-fact man in choosing the physical labor of "shinning" up a temple column to the utterly exhausting labor of digging out the meaning of our modern inheritance tax law.

In view of all these difficulties and problems I am convinced in my own mind that the solution lies, as Professor Seligman of Columbia has pointed out recently, in a single levy on the estates of decedents by the Federal Government with an apportionment of the proceeds among the states. I am not prepared to state exactly how that apportionment should take place. But certain principles might be laid down to guide in the preparation of an exact plan.

1. The States should participate in proportion to the assistance they have rendered the decedent in the protection of his property.

2. Some attention should be given to the

needs of the states, and this probably can best be gauged on the basis of population.

3. The federal government should be regarded not as the patron of the states, disbursing alms, but as their servant charged with the duty of sustaining them.

DECISIONS AND RULINGS

EDITED BY A. E. HOLCOMB

LATE SUPREME COURT DECISIONS.—An interesting opinion rendered June 1st, 1920, which we are able only to briefly refer to, is that of the United States Supreme Court in reversing the District Court in the case of *Evans* v. *Gore* (260 Fed. 550) and holding that the inclusion as taxable income under the federal law of the salary of a federal judge is unconstitutional. The opinion is lengthy and, among other things, reiterates the view expressed in other cases that the words "from whatever source derived" in the 16th amendment are not to be held to increase the taxing power of Congress other than by removing the necessity of apportionment in taxing incomes.

Another important opinion rendered on the same day is that in the case of *Cream of Wheat Co.* v. *County of Grand Forks*, reported in 170 N. W. 863 and digested in BULLETIN, Vol. IV, page 246. By this opinion the state court is affirmed in holding that the taxation of a domestic corporation upon its capital stock even though it has no property in the state and does no business therein is not an unconstitutional exercise of the taxing power.

EXCISE TAX—FOREIGN CORPORATIONS—INTERSTATE COMMERCE — UNIT RULE OF ASSESSMENT.—It is well settled that taxes on property or on franchises treated as property must refrain from assessing extra-territorial values. When interstate properties are valued as a unit and some fraction is then taken as the part located within the jurisdiction, the Supreme Court insists that the assessment must apply a proper ratio to a proper base. Property outside the state which cannot contribute to the value of what is within the state must be excluded from the base. *Fargo* v. *Hart*, 193 U. S. 490; *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298.

Undoubtedly more latitude is allowed in assessing excise taxes than in assessing property taxes. The excise may be a specific tax of a uniform amount or varying according to the population of the area in which business is done. Excises measured by property within the state or by that part of the total capital stock which represents the property within the state are sustained. *St. Louis, S. W. Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Lusk* v. *Botkin*, 240 U. S. 236. But excises which cannot by reason of a maximum limit be brought within the class of specific taxes and which are measured by total capital stock representing property without the state are as vicious as similar taxes on property or on franchises treated as property. The vice of such statutes has been that they have sought to accomplish through the levy of an excise tax the assessment of extra-territorial values. This was formerly thought proper when the subject of the tax was the privilege of a foreign corporation to engage in local business within the state. But in the *Western Union Case* and those succeeding it, the measure of an excise tax was held invalid when it inevitably in all cases took account of extra-territorial values.

In some of the cases annulling excise taxes measured by total capital stock, the opinions have called the tax one in effect on property beyond the jurisdiction. This has led some to assume that it might still be possible for a "true excise tax" to escape from the shackles of the *Western Union Case*. It is more likely, however, that the Supreme Court was trying not to draw distinctions between true excise taxes and fake excise taxes that were really property taxes, but merely to indicate that an excise when unequivocally measured by property may have the same vice of extra-territoriality as a formal property tax. Any doubt on this matter is now set at rest by a unanimous decision enjoining the attempted assessment of North Dakota's special excise tax on foreign corporations.

As the injunction involved was only a preliminary one, the court did not enter into nice calculations as to the precise extent of North Dakota's unwarranted greediness. Mr. Justice Holmes gives us the facts and the law in characteristically compact and lucid fashion. After saying that the tax law "purports to be a special excise upon doing business in the State," he continues:

"As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main-track mileage is plain. But that is not all.

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised within the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be — whether a tax on property, or, as here, an excise upon doing business within the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law." — *Wallace et al.* v. *Hines,* U. S. Sup. Ct., May 3, 1920.

Tax Commission — Powers — Equalization—Injunctive Relief. — The test of the legality of the strenuous efforts of the Indiana State Board of Tax Commissioners to revolutionize the system of assessment (or underassessment) in that state which were undertaken as a part of the program pursuant to which the 1919 legislative changes were made has recently reached its initial stage through a decision of the appellate court.

The Board ordered wholesale increases of classes of property throughout the state at percentages differing in the different counties and townships. This action was attacked through a suit to enjoin the county officers of one county from complying with the orders. The circuit court granted the injunction, holding the action illegal. The contentions were that the Board had no power to equalize as between townships within a county or as between different classes of real or personal property; that it must equalize as between counties only and in so doing must act upon the certain specified classes and upon the aggregate of such classes.

The appellate court deemed it unnecessary to decide upon the power of the Board to act as it did, though observing that it was not prepared to hold that such power was wanting. It contented itself with a careful discussion of the province of a court of equity in a case where, as here, the issuance of the injunction prayed for would cause widespread confusion and hardship to the entire state. Copious citation is made from the opinions in cases from other jurisdictions, all tending to indicate the rule that where a remedy at laws exists, litigants will be held confined to such relief, where the effect of injunc-

tive relief would break down the revenue system of the state for the year and cause irreparable injury and confusion and more harm would be done than would be prevented. The judgment was reversed and the cause remanded, the litigants being thus left to their legal remedy.—*Fesler* v. *Bosson,* 126 N. E. 20.

Review of Assessments — Conlusiveness of Official Action. — On an appraisement of real property for the assessment of inheritance tax the state appealed to the circuit court from the action of the Probate Court, claiming undervaluation. The appeal was dismissed and such dismissal was upheld by the supreme court of Arkansas, it appearing that there was no statutory authority for such appeal, such as was held necessary to authorize a review of the action of duly constituted officials.—*State* v. *Bowlin's Estate,* 217 S. W. 464.

Assessments—Sufficiency of Notice of Increase—Appearance as Waiver of Notice.—In a Montana case the taxpayer who had been notified by the assessor of an increase and who entered an objection because the notice given was inadequate, being less than that required by law, was held by his appearance and objection to have waived the irregularity. — *Anaconda Copper Min. Co.* v. *Ravalli County,* 186 Pac. 332.

Fraudulent Assessment—Arbitrary Basis.—Where it was shown that the assessments complained of were from four to seven times assessments made upon adjoining properties and that the assessor had adopted a minimum value per acre for all such properties and particularly where in a condemnation proceeding to acquire the property in question the award was one-fourth the assessed value, the assessments must be held invalid as being fraudulently made.—*Titlow* v. *Pierce County,* 185 Pac. 575.

Insurance Companies—Deduction of Reserves. — A statute of Georgia providing that the amount of the reserve fund required by law to be held by insurance companies for policyholders should be deducted, with other items, from the assets, in obtaining the taxable value of the personal property of such companies was held not in violation of any constitutional provision, no such provision being specified in the demurrer.—*City of Atlanta* v. *Standard Life Ins. Co.,* 101 S. E. 122.

Equality and Uniformity—Railroad Bridge. — In a proceeding to review the assessment of a railroad bridge, the Iowa supreme court affirmed earlier decisions, holding that if the record disclosed that all other real property in the city was, in fact, assessed at 60 per cent of its actual value and the bridge at full value, such assessment could not be sustained.—*Union Pac. R. Co.* v. *City of Council Bluffs,* 175 N. W. 7.

Capital Stock—Classification. — A Pennsylvania statute provided a tax upon companies "organized and incorporated for the purpose of distilling liquors and selling the same at wholesale". A corporation of that character was held taxable thereunder, although it did no distilling in the state, the court holding that it came within the class although all its distilling was done without the state.—*Commonwealth* v. *Hannis Distilling Company,* 108 Atl. 822; see also *Commonwealth* v. *John McGlinn Distilling Co.,* 108 Atl. 823.

Assessments—Notice of Increase.—Where a taxpayer had actual notice of an increase in his assessment and opportunity to take steps to contest same, the tax upon such increased assessment was not invalid because of failure of the authorities to give notice in the particular manner provided by the statute. — *Oates* v. *Fountain,* 101 S. E. 830.

Assessments — Listing — Notice of Increase. — An agent of land owners appeared before the assessor and an assessment was arrived at which was entered upon the roll. Thereafter, by direction of the State Board of Affairs, an increase was made without notice to the owner or his agent. Upon appeal, the court held that the testimony of the assessor that he stated to the agent that the assessment was tentative and that if the State Board should thereafter order an increase, he would make it, did not disentitle the agent to the notice of increase provided by the statute. —*Forest Lumber Co.* v. *Word,* 83 So. 551.

Classification—Exemptions. — In a recent case the Minnesota court held that while the legislature had a wide discretion in classifying property for tax purposes, the classification must be based upon reasonable grounds of distinction; that all similarly situated must be treated alike; that a law imposing taxes on premiums of insurance companies, based upon arbitrary facts with respect to different companies and exempting domestic mutual fire insurance companies, violated the constitutional requirement of uniformity as between the same classes of subjects.—*State* v. *Minnesota Farmers' Mut. Ins. Co.,* 176 N. W. 756.

Tax Assessed as Penalty — Intoxicating Liquors. — A statute of Nebraska provided that where an injunction issued for violation of the liquor laws constituting a nuisance, a tax of $300 should be assessed against the premises in question, to be collected like other taxes and constitute a lien. This statute was held unconstitutional because, if a tax, it was not assessed pursuant to the uniformity provision of the constitution as to the collection of revenues. — *State* v. *Macfarland,* 175 N. W. 663.

Capital Stock, Measure of Valuation of — Presumption of Validity of Action of Assessing Officers. — In a back tax proceeding for the taxation of the capital stock of a corporation, it appeared that the entire assets consisted of real and personal property which had been regularly assessed. The corporation claimed that this being so and as no evidence was introduced to show any value for the capital stock in excess of the value of the property, the action of the lower court in canceling the assessment complained of was correct. The supreme court held that the validity of acts of assessing officers was presumptively correct and that the burden was upon the complaining corporation to show its incorrectness; that the value of the capital stock was not necessarily measured by the assets but that it had a value in excess thereof, indicated by evidence of earnings, payment of income tax and general improvement in its financial condition. The tax was therefore sustained.—*Robertson* v. *U. S. Nursery Co.,* 83 So. 307.

Franchises—Street Railway—Railway on Bridge. — A street railway operated its cars over a bridge upon a division of fares with the lessor of the bridge. It contested an assessment which included a large sum designated as "all other" property, urging that the action constituted a double assessment, was unequal as compared with other assessments of similar properties, was invalid as it was not exercising a franchise other than that of being a corporation. The court, upon full discussion of the contentions rejected all, holding the assessment valid.—*State* v. *St. Louis & E. St. Louis Elec. Ry. Co.,* 216 S. W. 763.

Mine Taxation—Basis of Valuation —Errors of Judgment. — The Michigan supreme court recently reviewed assessments fixed upon certain mining properties which had been largely increased, such assessments having been claimed to be made arbitrarily and fraudulently, thus affording ground for the recovery of taxes paid under protest. The court quoted at length from the opinion of the trial judge and affirmed the assessments upon his opinion. It appeared that the assessments had been fixed largely upon a consideration of the market value of the stocks of the companies, which method was held appropriate and quite as satisfactory as other methods, if not more so.

The judgment was, however, affirmed upon the view of the court that the assessments had not been shown to have been made arbitrarily or fraudulently or by the adoption of a fundamentally wrong principle, such proof being held necessary to justify a court in overturning assessments, that rule having been established by the decision in *Newport Mining Co.* v. *City of Ironwood,* 152 N. W. 1088, which had been followed in numerous decisions.—*Copper Range Co.* v. *Adams Township,* 175 N. W. 282.

Valuation Methods — Relief from Assessment by Fundamentally Incorrect Method — Natural Gas Plant.— The Arkansas Tax Commission assessed a natural gas plant largely in excess of the value returned. Upon appeal, the court held that while the general rule was that no relief could be granted from an exercise of the judgment of the assessors in the

absence of statutory authority therefor, that rule did not hold where it could be shown that a fundamentally incorrect method was used. In this case the commission had arrived at its assessment by capitalizing the net operating revenues, for which the court held no authority in law existed; that in such a plant such a method resulted in capitalizing capital values as the revenues derived represented exhaustion of capital; that property was assessable whether or not it produced income and that it was not taxed according to its income.—*Martineau* v. *Clear Creek Oil & Gas Co.*, 217 S. W. 807.

INHERITANCE TAX — SUIT BY A STATE OF RESIDENCE TO COLLECT TAX IN FOREIGN STATE—JURISDICTION. — The interesting litigation in the courts of New York by the state of Colorado to collect an inheritance tax from the estate of a resident of that state, has reached the appellate court, which reversed the decision of the lower court (175 N. Y. Supp. 685; *Bul.* V, 29).

The court held that the objection that personal service was necessary to give jurisdiction, was not valid in this case because the defendants had taken advantage in probating the will in New York of the claim of Colorado residence of the testator and they could not be heard to complain of the proceedings to enforce the obligation of the statutes of that state.

The right of the state of Colorado to maintain the suit was upheld as authorized by the Colorado statutes, and it was held that it should not be denied the right of access to the courts of New York, on grounds of interstate comity, no objection from the standpoint of public policy being seen. The cases where New York courts had refused to enforce stockholders' liability under foreign laws (*Howarth* v. *Angle,* 56 N. E. 489) were referred to as resting upon contractual relations; here the defendants, by their own acts, had assumed the statutory obligations and made them contractual. The judgment of the lower court dismissing the complaint was reversed and judgment directed for plaintiff.—*State of Colorado* v. *Harbeck,* 179 N. Y. Supp. 510.

INHERITANCE TAX—PRINCIPLES ESTABLISHED — NATURE OF — CONSTITUTIONALITY.—In three cases decided together, the Virginia court of appeals considered numerous objections raised against the inheritance tax law of that state enacted in 1916 (Acts 1916, p. 812). The opinions are useful in bringing together the authorities upon the various points discussed and which have heretofore been raised and settled in other jurisdictions. Much was made of the objection of lack of due process in the assessment because of claimed inadequate notice and opportunity to contest the validity of the tax or its amount. The fundamental nature of an inheritance tax, as not a property tax but a tax in the nature of a privilege is pointed out. The remedy by injunction was held available to the taxpayer, as there was no other remedy as in the case of a property tax. The act was interpreted as imposing a tax on the distributive shares rather than upon the estate.

In one of the cases it was held that the tax was to be governed by the act in force at the time of decedent's death though not assessed until after the act had been amended. Another holding was that the court would correct injustice if found, and hence that any irregularity in the original assessment was of minor consequence. It was further held that the expenses of administration and debts should be deducted from the gross estate, the exemptions allowed to each beneficiary being deducted from the balance before computing the tax upon each.—*Commonwealth* v. *Carter; Heth* v. *Commonwealth,* and *Withers* v. *Jones' Ex'x,* 102 S. E. 58, 66, 68.

INHERITANCE TAXES — REFUND UPON HAPPENING OF CONTINGENCY. — A will provided for distribution in accordance with certain contingencies. Under the statute the tax was assessed in accordance with the contingency that imposed the highest rates. Thereafter a contingency happened relieving from the necessity originally in force, which required the application of the rates imposed. Thereupon petition was filed to modify the order and assess the tax in accordance with the actual situation at the time, under a statute claimed to apply but which was contested by the state comptroller. The court upheld the action of the Surrogate in allowing the modification which required the repayment of the excessive tax.—*In re Redmond's Estate,* 179 N. Y. Supp. 307.

Inheritance Tax — Deduction of Debts. — The Surrogates Court of New York County has held that where a resident decedent left tangible property located outside the state, and hence not subject to inheritance tax, his debts should be deducted prorata from all his property, whether taxable or non-taxable, and that in the instant case a prorata proportion of such debts should be held applicable to the property outside; the assets in the state and taxable, may not be diminished by the entire indebtedness. The point was said not to have been heretofore decided.—*In re Boldt's Estate,* 180 N. Y. Supp. 636.

Inheritance Tax — Deduction of Federal Estate Tax.—The Indiana appellate court has held that the federal estate tax is a proper deduction in determining the state inheritance tax, citing and following the rule in Illinois, Minnesota, New Jersey and New York.—*State* v. *First Calumet Trust & Sav. Bk.,* 125 N. E. 200.

Licenses — Revenue or Regulatory Measure—Test is the Legal Effect.—An ordinance imposing fees upon auctioneers based upon a percentage of the sales, was held to be in fact and in legal effect a revenue measure and not one imposed for regulatory purposes, as upon examination the payments were so large and so wholly out of proportion to the needs of regulation as to demonstrate a purpose to impose a tax for revenue in the guise of regulation. The purpose was unauthorized by the charter power to regulate sales at auction.

The requirement to keep account of sales and report the same was held only incidental to the collection of the charge and hence to fall with it. — *City of New London* v. *Howe,* 108 Atl. 529.

Licenses — Reasonableness. — The terms of a license ordinance on pool rooms were considered by the Georgia supreme court and held not unreasonable, except one providing that the conducting of such a business was to be restricted to a certain designated and limited street location, but this was held not such a vital part of the ordinance and so interwoven in the whole scheme as to render the ordinance void.—*Purvis* v. *City of Ocilla.* 102 S. E. 241.

Licenses—"Emigrant Agent"—Corporation Employee. — An Act of South Carolina required a license from persons engaged in the business of emigrant agents, who were defined to be those hiring persons in the state to be employed outside the state. An employee of a railroad, while under federal operation, was instructed to secure laborers for the railroad to do work in North Carolina. The defense to a conviction for violation was that such an employee was not an "emigrant agent" and that the statute did not apply to an employee of a railroad under federal control. Both defenses were overruled and the conviction was affirmed.—*State* v. *Bates,* 101 S. E. 651.

Licenses—Classification—"Tax".—An ordinance adopted by a city, pursuant to an Arkansas statute imposing a tax upon various occupations, was attacked upon numerous grounds. It was held a tax and not a regulatory fee, and hence not limited to the cost of regulation. Classification based upon the amount of goods was held proper, with reference to the full discussion in *City of Newton* v. *Atchison,* 1 Pac. 288. The classification among lawyers based upon length of practice, was held invalid as being in reality based upon income which was specifically prohibited by the act. This, however, was held not to invalidate the tax, which the court held could be imposed at the lowest rate upon all lawyers.—*Davis* v. *City of Hot Springs,* 217 S. W. 769.

Licenses—Classification of Cities—Population. — By an act of the North Carolina legislature the license tax upon moving picture shows was graded in proportion to the population but the act contained no direction as to how the population was to be determined. In a recent case it appeared that the superintendents of schools of the city had made an enumeration of the population from which it was shown that the city in question had a population in excess of that shown in the last federal census. A license tax was sought to be imposed upon the basis of that enumeration upon the theory that population could be judicially determined like any other fact. This contention was denied, it being held that the basis of the classification must be such as shown by a census

conducted under authority of law with the necessary means of officially enforcing the same; a private enumeration could not be accepted. — *State* v. *Prevo,* 101 S. E. 370.

Licenses — Display of Automobile License. — The Texas court of criminal appeals has held that upon a proceeding to assess a fine for failure to display the official seal on an automobile, it was a proper defense that the owner had paid taxes and secured signs for 16 automobiles and had given directions to his employees to affix the same, which had been done except in the case of one automobile, the failure in that case being due to negligence of the employees.—*Axtell* v. *State,* 216 S. W. 394.

Licenses—Loan Brokers.—Upon petition for rehearing, the Texas court of criminal appeals reversed its original decision and held that while the business of the loan broker as defined in the Act in question and which was sought to be regulated, was properly subject to such regulation and was not a private business not subject to license, yet the drastic requirements as to the giving of bond and the obligations of the sureties thereon were of such a nature as to deny the citizen equal protection of the law and rights guaranteed him by the constitution. — *Juhan* v. *State,* 216 S. W. 873.

Licenses — Mercantile Tax—"Vender".—A corporation engaged in refining oil and manufacturing certain products thereof, maintained several relay or distributing stations at which it sold its own products and also those of others, and also from which deliveries were made of goods sold from its central sales force. It contested the legality of computing the tax, in the case of the stations, by including the deliveries of sales made through its central force, the tax being based upon the gross volume of business done. The court, upon full consideration, upheld the taxes as assessed and refused to enjoin the collection thereof. — *Atlantic Refining Co.* v. *Van Valkenburg,* 109 Atl. 208.

Licenses — Automobile Dealers — Classification. — A Georgia statute imposing taxes upon automobile dealers at rates graduated with respect to the population of the county and containing other provisions claimed to be arbitrary, was held not invalid as discriminatory or unreasonable.—*Adams Motor Co.* v. *Cler,* 102 S. E. 440.

Licenses — Surety Company as Insurance Company.—After paying the tax on insurance premiums imposed by a Kentucky statute, for many years without objection, a surety company decided that it was not liable and sought to recover sums previously paid. This contention was based upon the claim that a surety company was not an insurance company and hence not liable, because the tax was imposed upon the latter companies. The court, upon full discussion and citation of authority, rejected the claim, holding the surety company to be essentially an insurance company.—*Greene* v. *National Surety Co.,* 217 S. W. 117.

Licenses — Interstate Commerce—Telegraph Company.—A telegraph company contested the validity of a license tax by testimony of subordinate officers, not directly in charge of the matters which the testimony referred to, claimed to show that the tax complained of was a burden upon interstate commerce. The court held that as the character of the testimony was identical with that held in *Postal Tel. Co.* v. *Richmond,* 249 U. S., inadequate to show clear interference, that case was conclusive and upheld the conviction and fine imposed by the lower court for conducting business without payment of the license.—*Postal Telegraph-Cable Co.* v. *City of Charlottesville,* 101 S. E. 357.

Federal Corporation Excise Tax—Limitation on Interest Deduction—"Paid Up" Capital Stock.—The limitation imposed upon interest deductions by the Corporation Excise Tax Act of 1909 to an amount of indebtedness not exceeding the "paid-up capital stock" means the par value of the paid-up capital stock. Therefore premiums on stock sold above par may not be included in computing the amount of paid-up capital stock for the purpose of the Act. The definition of "paid-up capital stock" contained in a local state statute is not binding upon a federal court when interpreting a federal taxing statute. — *Boston and Maine Railroad* v. *U. S.,* U. S. C. C. A., First Circuit, March 19, 1920.

CORPORATION EXCISE TAX — STREET RAILWAY IN HANDS OF RECEIVER. — The Massachusetts supreme court has held that a street railway is liable for an excise tax upon the privilege of operation in the public streets, measured by gross receipts from such operation, for the entire period of the tax year, without regard to the fact of the appointment of a receiver during such year. The franchises of such a corporation are exercised for the benefit of creditors and excise taxes based on such exercise are properly due and payable by the receiver who is custodian of the property and in charge of its operation.—*Harvey* v. *Bay State St. Ry. Co.,* 125 N. E. 614.

CORPORATION EXCISE TAX OF 1909—DEPRECIATION — INCOME OF INSURANCE COMPANY—RECOVERY OF INTEREST. — In reversing the District Court (257 Fed. 576; 262 Fed. 215), the Circuit Court of Appeals held that in computing the net income of a life-insurance company a deduction should be allowed as "depreciation" for loss in value of securities owned which had been suffered during the year.

In a suit against a collector to recover a tax, the defendant may give evidence of offset due by reason of other circumstances arising in the examination of the legality of the tax complained of.

Dividends due policyholders pursuant to requirements of state statutes, representing excess premiums, are not to be included as income of the company.

Interest is recoverable in a suit against a collector to collect excess tax assessed.—*N. Y. Life Ins. Co.* v. *Anderson,* 263 Fed. 527.

STATE INCOME TAX—INCOMES AS PROPERTY.—The decision of the Supreme Court of Alabama on the appeal from the District Court whose opinion we noted in the last issue, completely sustains the lower court and strikes down the entire act. Three opinions were rendered, the majority rejecting the act in its entirety while two justices hold it partially valid, one to the extent that the tax exceeds the limit provided in the Constitution upon that income which has not been disposed of at the end of the taxable year and the Chief Justice to the extent that the tax upon the entire income exceeds the constitutional limit. All justices agree that income is property, and thus that the tax is subject to the limitation.

The majority opinion is exhaustive in its discussion of the two questions (1) whether income is property and (2) whether being property, it is within that term as used in the constitutional provision limiting the rate to 65/100 of 1% "on the value of the taxable property within the state."

Starting with a quotation from Holmes, p. 223, defining income, it proceeds with citations from numerous cases, concluding that it is "so clear as not to be debatable" that "income includes property and nothing but property, and therefore is itself property," referring the doubtful to *Ludlow Co.* v. *Woolbrinck* (Mo.), 205 S. W. 196, 202, and *State* v. *Pinder* (Del.), 108 Atl. 43.

The court is equally positive that the term "property" as used in the constitutional provision, includes incomes by a review of its numerous prior decisions, laying particular emphasis upon *W. U. Tel. Co.* v. *Board of Revenue,* 80 Ala. 378, arriving at the settled conviction that the aim of the constitution-makers was to protect *property,* not some property, but all property, whether held at moments of time or at the end of a period of time. The Missouri case of *Glasgow* v. *Rouse* and the Georgia case of *Waring* v. *Savannah* are referred to as faulty in reasoning and as "condemned by modern judicial thought." The dissenting opinion of Judge Farris in the *Woolbrinck* case is mentioned as "an unanswerable indictment of the theory that income is not property within the meaning of constitutional safeguards."

The court further holds that even considered as property, incomes could not be taxed in the ordinary manner under the property tax; that express provision must be made for the assessment of incomes.

Neither does the majority feel that they can support the contention of the Chief Justice that the act is ineffective only to the extent that the rate exceeds the constitutional limit, because to so hold would be an unwarranted assumption of judicial legislation involving the court in "quagmires of difficulty."—*Eliasberg Bros. Mercantile Co.* v. *Grimes,* Ala. Supreme Court, April 24, 1920.

INCOME TAX, STATE — INCOME FROM SERVICES — INCOME WHEN RECEIVED— PARTNERSHIP. — A partnership taxable under the Wisconsin income tax law claimed the exemption, as capital, of that portion of a sum received for legal services in 1916, which it claimed was earned prior to Jan. 1, 1911, the effective date of the law, and also expenses incurred before that date. The Board of Income Tax Review rejected this claim, and also held that not all the amounts distributed to the partners was for services in 1916 and deductible in assessing the partnership. The court held, referring to its prior discussion in *Bundy* v. *Nygaard,* 158 N. W. 87, that income included all of the sum received in 1916, regardless of when the services were rendered; that. on the other hand, the entire sum distributed to the partners in 1916 was properly deductible in assessing the partnership.—*State* v. *Phelps,* 176 N. W. 217.

INCOME TAX—"GIFTS". — A note not delivered to the payee in the lifetime of the maker was not effective as a gift.—*Isett* v. *Maclay,* 108 Atl. 610.

INCOME TAX, STATE. — The Wisconsin act, ch. 667, Laws 1919, providing for soldiers' Bonus was attacked on numerous grounds, all of which were rejected and the act held valid by the supreme court in a lengthy opinion. The objections to the taxing scheme embodied in the act were that the surtax provisions constituted special discriminatory legislation in violation of the uniformity clause of the constitution; that there was no basis for the classification; that the various provisions as to exemptions were unequal, and that there was lack of uniformity between railroads and others. Objection was also made that the tax was not for a "public purpose" and involved an unconstitutional delegation of legislative power.

The various objections to the provisions involving changes in the income tax law were substantially all held settled by the decision in the *Income Tax Cases,* 134 N. W. 690, or by the ruling that the uniformity clause of the constitution did not apply to the income tax which had been held not a property tax. The provision for the bonus was held a tax for a public purpose. —*State* v. *Johnson,* 175 N. W. 589.

DOMICILE — RESIDENCE. — In a recent case the Virginia supreme court had before it the determination of the liability of a person to income tax and tax on intangible property as a resident of the state. The person in question had acquired property in Virginia and had devoted much time and attention to its care and development but claimed residence in Washington, D. C.

The opinion of the lower court, describing in detail acts which it held to indicate an intention to make Virginia the residence and discussing the legal effect of such acts, was adopted and the assessments complained of held valid.—*Bowen* v. *Commonwealth,* 101 S. E. 232.

INCOME TAX, STATE — "RECEIPT"— NON-RESIDENT.—A Wisconsin Trust Company acting as trustee for a Pennsylvania beneficiary, permitted a Pennsylvania corporation to pay dividends in Pennsylvania directly to the beneficiary there. It entered the dividends upon its books as though received and debited the beneficiary with the payments. The Wisconsin court held that testator intended the trust to be administered in Wisconsin and that the transaction above described constituted in law a payment of income to the Wisconsin trustee and that such income was "received" by it and properly subject to the Wisconsin income tax.

In a dissenting opinion strong objection is made to the prevailing view and it is pointed out that it overlooks the distinction between a tax on personal property and a tax on the recipient of an income therefrom and the doctrine that the taxing power of a state is not extra-territorial. Notes in L. R. A., 1915 C, 949, and *In re Countess de Noailles Estate,* 84 Atl. 665, are referred to as discussing the distinctions between property and income taxes.— *State* v. *Phelps,* 176 N. W. 863.

BRITISH INCOME TAX — PURCHASE AGREEMENTS—INTEREST.—The Hudson's Bay Company owns large tracts of land in Canada and from time to time sells plots or blocks of land to purchasers desiring to take up and occupy land for settlement in that country. The company enters into agreements with purchasers unable to provide the whole purchase money in one sum,

under which the purchaser pays a certain sum down when the contract is signed and the balance by equal annual instalments, each with interest calculated on the balance of the purchase money remaining unpaid. The company agrees on completion of payment of the purchase money and interest to convey the land to the purchaser and meanwhile permits the purchaser to occupy the land until default made in payment of the sums of money agreed upon, in which case it reserves the right to cancel and determine the agreements and to reenter upon or to resell the lands, all payments theretofore made on account being forfeited to the company.

Held, that the interest on unpaid purchase money was income and not capital; that it was interest and not rent; and that as the interest was secured by covenant upon a debt which was itself covenanted to be paid, the interest was "income arising from securities" within the meaning of Section 5 of the Finance Act, 1914, and Case IV of Schedule D. — *Thew* v. *Hudson's Bay Company,* Gt. Brit. Tax Cases, Vol. VII, pt. III, p. 206, July, 1919.

British Income Tax — Resident in United Kingdom, Employed Out of United Kingdom. — The Appellant was employed as agent by a company trading in Nigeria. In the year of assessment he was serving under a separate agreement with the company in respect of each journey to that country, and it was a condition of his earning salary or commission that he should remain in Nigeria during the period of his agreement. On his return to the United Kingdom, he ceased to be in the service of the company or to receive remuneration from them. During the year of assessment he was rated owner of a residence in the United Kingdom where his wife and family resided, and he was personally present there during four months of the year. Sums were paid by his direction out of his remuneration to his wife during his absence abroad and the balance of his earnings, less some sums expended by him abroad, were received by him in the United Kingdom.

Held, that the Appellant was resident in the United Kingdom during the year of assessment and was correctly charged with Income Tax on his remuneration so far as received by his wife or himself in the United Kingdom. — *Thomson* v. *Bensted,* Gt. Brit. Tax Cases, Vol. VII, pt. III, p. 137, Oct. 1918.

British Income Tax — Detective— Cash Allowance for Clothing.—A detective-sergeant in the employment of the Corporation of Glasgow was assessed in a sum of approximately $945, which included $57 paid to him in cash as allowance for clothing. Detective officers, for the purpose of their work, wear plain clothes, and in order to avoid uniformity each officer receives an allowance in cash and out of this allowance supplies his own requirements. The allowance is fixed by reference to the corresponding free issue of clothing made to uniformed members of the force. The clothing which the officer must purchase is specified and is subject to the approval of a superior officer. The allowance for clothing is not regarded as income for superannuation purposes and, apart from this allowance, detective officers receive the same rates of pay as uniformed officers.

Held, that the allowance was a payment accruing to the respondent by reason of his office and was assessable for income tax. — *Fergusson* v. *Noble,* Gt. Brit. Tax Cases, Vol. VII, pt. III, p. 176, June 1919.

British Income Tax — Deduction— Expenses Incurred in Reduction of Capital of Limited Company.—A company which had made losses in trading, carried forward a debit balance from year to year in its balance sheet. The existence of this debit balance stood in the way of the payment of dividends when the company entered on a period of profit-earning. To enable dividends to be paid, the company applied to the court to have its capital reduced, and in so doing incurred legal and other expenses. The appellant company claimed to deduct these expenses in computing the balance of profits and gains for the purposes of assessment of income tax.

Held, that the expenditure in question was not expenditure for the purpose of the trade of the company, but for the purposes of distributing the profits of its trade, and was not a proper deduction in computing the profits for the purposes of assessment.— *Archibald Thomson, Black and Co., Ltd.* v. *Batty,* Gt. Brit. Tax Cases, Vol. VII, pt. III, p. 158, Jan. 1919.

PUBLIC PURPOSE.—The Nevada supreme court held that in determining whether a tax is levied in furtherance of a public purpose, not only the purposes of the legislation directing the imposition of the tax are to be considered but the practical effectiveness of the means provided for accomlishing those purposes. Hence where bonds were authorized to provide a fund to aid in the development of a land reclamation project but it appeared that there was no assurance that the project could be developed as intended and that under the plan the moneys could readily be devoted to the private purposes of individuals, the tax was to be considered unauthorized, as not for a proper public purpose.—*State* v. *Williams,* 185 Pac. 459.

PUBLIC PURPOSE. — The South Dakota supreme court, while recognizing that the amendments made in 1918 to the Constitution, authorizing the state to embark in various enterprises, evidenced a design to develop the resources of the state and its economic facilities yet did not indicate a purpose to abrogate or modify the article, declaring that taxes should be levied for public purposes only. It therefore held that an act of the legislature appropriating a sum of money to compensate an individual for injuries sustained by him while in the militia service of the state, was in violation of the article referred to, as it did not constitute an appropriation for a public purpose.—*Mackey* v. *Reeves, State Auditor,* 175 N. W. 359.

PUBLIC PURPOSE — SOLDIERS' BONUS.—Further consideration was given by the Wisconsin court to soldiers' bonus legislation, heretofore noted, in its decision in passing upon the Educational Bonus Act (Ch. 3, Laws 1919). Objections raised in the cash bonus case (175 N. W. 589), were raised in this case, and it was urged besides that the state was lending its aid to private individuals, was creating a debt for a private purpose and was aiding religious schools. In the decision in this case, the court examined at length the fundamental conceptions of our system of government and obligations of the citizen to the federal and state governments respectively, arriving at the conclusion that the gratuity to the soldiers was clearly justified as a public purpose. The other objections were easily met by the holding that the act did not create a debt but that the educational assistance offered was a pure gratuity; that the provisions for meeting increased expenses of private schools did not result in enriching them but in merely reimbursing them for such increased costs. —*State* v. *Johnson,* 176 N. W. 224.

TAX LIMITATIONS—CERTAIN EXPENSES NOT WITHIN THE LIMITATION.—A statute of Idaho provided that where the new boundaries of a county should divide a school district, the property and indebtedness of the district should be divided and the cost assessed upon each prorata according to assessed value. In a case arising under this statute a school district declined to pay a judgment recovered against it for such expense, urging that the constitution prohibited it from incurring indebtedness without a vote of the electors. The court held that as this obligation was imposed by law, it was not within the constitutional limitation. It further urged a limitation prohibiting the levy of a tax in excess of 10 mills, which would be exceeded by the levy required to pay the judgment. The court held that the statute authorizing the contracting of the debt carried with it authority to levy a tax necessary to pay the same. — *Independent School Dist. No. 12* v. *Manning,* 185 Pac. 723.

"TAX" — "FRANCHISE PAYMENT".—The Pennsylvania court held that an annual charge upon a street railroad imposed in the ordinance granting permission to occupy the streets is the price paid by the company for the rights and privileges, and amounts to the purchase of a franchise which the municipality had a right to sell. "It rests upon contract and is in no sense a tax. . . . Neither is it a license fee, collectible under the police power. . . . Nor is it governed by the rules applicable to taxes and license fees." — *Valley Rys.* v. *Borough of Mechanicsburg,* 108 Atl. 629.

JURISDICTION — "MUNICIPAL CORPORATION".—In passing upon the legality of a tax the Louisiana court held that a road district, authorized to levy taxes for road improvements was not a "municipal corporation" as used in article 85 of the constitution; that only cities, towns and villages were included in that designation. —*William T. Joyce Co.* v. *Police Jury,* 83 So. 587.

Exemption—Property Owned by Municipality.—The validity of an exemption of city property surrounding a reservoir was contested because rentals were obtained therefrom, which was claimed to withdraw it from the exemption because "held for pecuniary profit". The claim was rejected with citation of numerous authorities, the rental obtained being held merely incidental.—*City of Osceola* v. *Board of Equalization,* 176 N. W. 284.

Lease in Perpetuity as Taxable Property — Exemption by Contract.—The Kentucky court of appeals held that a lease for 99 years, with provision for renewal for like period, constituted a separate and distinct property from the ownership of the fee, and was therefore taxable to the lessee, the case being an exception from the ordinary rule, being similar to the case of oil and gas leases.

The lease was executed in 1839 by the city of Lexington and contained a clause exempting the property from city taxes. Upon a full discussion of this clause and citation of authorities it was held that the city had no authority to grant the exemption except upon valid consideration and for a reasonable period, otherwise such an exemption would be held in violation of the Bill of Rights, guaranteeing that all taxation should be uniform and equal.—*Purcell* v. *City of Lexington,* 216 S. W. 599.

Private Property on Lands Ceded to the United States for Canal Purposes.—The Michigan supreme court held that personal property of a contractor engaged in construction work on lands ceded to the United States for canal purposes was not beyond the jurisdiction of the state and was subject to taxation, the jurisdiction of the United States not being exclusive. — *Oscar Daniels Co.* v. *City of Sault Ste. Marie,* 175 N. W. 160.

Real Property — Tax Certificate.—In a recent Wisconsin case that a tax certificate was real property was held settled by the decision in *Eaton* v. *Supervisors,* 44 Wis. 489, which has never been overruled. Accordingly the certificate involved in the instant case became assets in the hands of an executor and could not be assigned by him but passed to the trustees to whom the real estate was devised by the will.—*Madler* v. *Kersten,* 175 N. W. 779.

Credits—Foreign Corporation—Conditional Sales—"Unclean Hands".—A foreign sewing machine company was assessed for the machines as property in the state of Ohio. Upon the trial the company introduced evidence of its method of sale which showed that the title passed to the purchaser with mortgage back. It was thereupon held that the machines were not properly assessed to the company, but as it returned no credits and as such credits were held taxable to it, the court refused relief upon the ground that the company was in fact, by what amounted to fraud, seeking to avoid all taxation and thus came into court with "unclean hands".—*Singer Sewing Machine Co.* v. *Cooper,* 261 Fed. 635.

Estate Tax — Property Passing under General Power of Appointment —Rule in Pennsylvania.—In a suit in assumpsit by the executor to recover that portion of an estate tax resulting from the inclusion in the gross estate of certain property as to which the decedent exercised by his will a general power of appointment conferred upon him by the will of his mother, Judge Dickinson directed judgment for the plaintiff, holding that the appointed property was not "after his (the decedent's) death . . . subject to the payment of the charges against his estate," within the meaning of the statute, since any rights of the creditors of the decedent to such property came to them not as creditors, but as appointees of the decedent.—*Pearce, Executor* v. *Lederer,* 262 Fed. 993.

Federal Estate Tax — Interest — Penalty. — Administratrix of person dying abroad, because of war conditions, failed to make estate tax return until lapse of two years five months after decedent's death, causing assessment of interest. She filed petition praying district judge to recommend to Secretary of Treasury remission of interest, under authority of Section 5292, R. S., empowering judges to recommend remission of penalties. Held: Power conferred is to submit recommendation based on facts. Controversy here involves question of law—whether interest assessed is or is not a penalty. Under circumstances

court declines to act.—*Mactavish* v. *Miles, Collector,* 263 Fed. 457.

INHERITANCE TAX—INTANGIBLE PROPERTY OF NON-RESIDENT. — The Louisiana court has recently held that the inheritance tax law of that state applies to intangible property consisting of securities owned by a non-resident decedent, kept in a bank in New Orleans, overruling its former decision in *Succession of Harrow,* 73 So. 683. —*Succession of Popp,* 83 So. 765.

INHERITANCE TAX—JOINT PROPERTY.— The joint ownership of property has always been considered an artificial and technical estate, with the limitation over to the survivor, and such right of survivorship created by law is one on which the state may impose the burden of a tax.

Where S., who was unable to write well, and was old and infirm, and unable to travel, deposited his money in the name of himself and V., to be drawn by either or the survivor, for the sole purpose of having such other person withdraw money to the needs of S., no part of such account on the death of V. was subject to a transfer tax.—*In re Van Vranken's Estate,* 179 N. Y. Supp. 752.

INHERITANCE TAXES—EXECUTORY CONTRACT OF SALE — DEDUCTION OF ENCUMBRANCES. — The interest of the vendor under an executory contract of sale is taxable as personal property under the Minnesota statute, and where the vendor died a resident, such interest is subject to the inheritance tax. The value of a decedent's real estate is measured by the value of the decedent's interest therein, determined by deducting the encumbrances from the value of the land. — *State* v. *Probate Court of Ramsey County,* 176 N. W. 493.

INHERITANCE TAX—WHAT LAW EFFECTIVE — TRANSFER IN CONTEMPLATION OF DEATH.—Taxability under the inheritance tax laws of California of a transfer made by a decedent in his lifetime must be determined by the law in effect at the time the transfer was made.

Under the California law, imposing a tax on transfers without valuable and adequate consideration, in contemplation of grantor's death, or intended to take effect in possession at or after such death, the transfer must be without an adequate consideration, as well as without a valuable one, to be subject to the tax, and must be made either in contemplation of death or intended to take effect in possession or enjoyment at death. In determining whether there is adequate consideration, the rule applicable in specific performance cases must control.

A transfer by a husband and his wife of certain realty to their children, subject to a life estate in the husband, HELD, under the evidence, supported by adequate and valuable consideration where it appeared that the actual consideration was not only a waiver by the wife of all her interest in the community property, but constituted a complete alteration of the relation between husband and wife, as authorized by Civ. Code, Sec. 151, notwithstanding that part of the consideration was not susceptible of exact valuation in money. — *In re Brix's Estate,* 186 Pac. 135.

INHERITANCE TAX — JURISDICTION TO IMPOSE — TRANSFER TO TAKE EFFECT AFTER DEATH. — Whether a transfer by way of trust is one intended to take effect at or after the grantor's death does not depend on whether the trust is revocable, but the test is whether the property passes with all attributes of ownership, independently of the death of the transferor.

Where the devolution of title to property involves a succession or inheritance tax, it is governed and controlled by the laws of the forum imposing the tax if the transfer is within the jurisdiction of the tax authorities, and imposition of such tax cannot be denied on the ground that it would interfere with comity between states, for it is a well-settled rule that no foreign law will be enforced in a state, if to enforce it will contravene the express statute law or expressed public policy of the forum or is injurious to its interests. — *Nickel* v. *State,* 185 Pac. 565.

INHERITANCE TAX—PROCEEDS OF REAL PROPERTY IN FOREIGN STATE SOLD TO PAY LEGACIES—DEDUCTION OF TAXES.— Inheritance taxes are not taxes on property, but on the succession which is not a natural right; hence, where an Iowa testatrix, owning real property in Nebraska, provided pecuniary legacies far in excess of her personal estate, so that it became neces-

sary to sell Nebraska real estate to pay the same, a conversion of the real estate thus needed to be sold will be implied, and the proceeds held liable for the collateral inheritance tax imposed by Iowa, even though the Iowa executor, who was appointed ancillary executor in the state of Nebraska, never brought the proceeds within the state of Iowa, and even though under the laws of Nebraska a similar tax was imposed and collected; there being no conflict between the taxing powers of the states.

Where part of the real estate was located in the state of Iowa and part in the state of Nebraska, the imposition of the Iowa collateral inheritance taxes should be on the basis of marshaling of assets, taking into consideration the amount of the estates in each jurisdiction, it appearing that the testatrix, after providing several pecuniary bequests, devised and bequeathed the residue to several beneficiaries, including her son, etc.

Under the Iowa Act providing for the deduction of debts in assessing collateral inheritance taxes, HELD that federal income tax which accrued shortly after testatrix's death, as well as the real estate tax imposed by the foreign state upon land owned by testatrix therein, might be deducted, as could expenses for repairs on farm buildings made before the testatrix's death, but that the federal inheritance taxes and real estate and income taxes imposed after the death of testatrix cannot be deducted. — *In re Sanford's Estate,* 175 N. W. 506.

INHERITANCE TAX — CHARITABLE BEQUEST. — Testator's residuary gift to trustees to pay net income, in the discretion of the trustees, to the use and benefit of a town, was for a valid public charity, within the definition of a "charity" as a gift for application consistent with law for the benefit of an indefinite number of persons by erecting and maintaining buildings or works or otherwise lessening the burdens of government, the authority of the trustees in determining application of income, extending to selection of subjects strictly public and therefore charitable.—*Peirce* v. *Attwill.* 125 N. E. 609.

INHERITANCE TAX—TRANSFER TO TAKE EFFECT AT DEATH.—If the actual intention of the parties to a deed be that the possession and enjoyment of the lands conveyed thereby are to be postponed until the grantor's death, the transfer of such lands is subject to inheritance tax, notwithstanding such evidence is not in writing but can only be shown by parol.

Where an owner of realty granted life estates therein to his wife and daughters, but continued to control the property conveyed and to collect its rents without an accounting, evidence HELD to support a finding that the parties intended grantor to retain control and possession of the property until his death, and that hence the transfer was subject to tax under inheritance tax act.—*People v. Shaffer,* 125 N. E. 887.

DEVISE PURSUANT TO CONTRACT, PASSES TO DEVISEES BY WILL WITHIN INHERITANCE TAX LAW. — Where decedent, in consideration of the agreement of petitioners to provide her suitable maintenance for life, agreed in turn to pay them $300 in cash, and to make a will devising her house to them in fee simple, both of which she did, the house property passed to petitioners by reason of the will on decedent's death, and the devise is subject to an inheritance tax under the Massachusetts law payable by petitioners and not by decedent's estate, in view of the failure of the contract and will to provide on the subject.—*Richardson et al.* v. *Lane,* 126 N. E. 44.

FEDERAL STAMP TAXES ON ISSUANCE OF CAPITAL STOCK. — Issuance of certificates of stock of one class in conversion and exchange for stock of another class held not required to be stamped as an "original issue", for the reason that Congress intended to tax transactions by which substantial consideration passed, and also for the reason that Congress, in reenacting a similar provision of the revenue acts of 1898 and of 1914, which had been construed by the Treasury Department as not requiring stamps upon certificates issued for conversion purposes, had approved and made part of the present act such former practical construction. T. D. 2752 considered. Decision of the District Court affirmed. — *Edwards* v. *Wabash Railway Co.,* U. S. C. C. A., 2nd Circ.

BANKRUPTCY ACT — PRIORITY OF FEDERAL TAXES.—Section 3466, Revised Statutes, giving priority over administration expenses to claims against insolvent estates for taxes is superseded by Section 64 (a) and Section 64 (b) of the Bankruptcy Act, allowing priority of claims for taxes only as to "creditors", because that term as defined by the Act does not include trustees or others acting for the estate, and federal tax claims are, therefore, subordinate to administration expenses of insolvent estates. —*Smietanka* v. *Zibell,* U. S. C. C. A., 7th Circ., Jan. 1920.

FEDERAL STAMP TAX — UNSTAMPED NOTE. — Where a note which the revenue laws require to be stamped is not stamped, it is not "complete and regular on its face," within the meaning of the Iowa Code Supp. 1913, and a purchaser of such a note is not a holder in due course, and must meet any defense that was good against the payee who transferred it.—*Lutton* v. *Baker,* 174 N. W. 599.

FEDERAL TAX ON BANKERS. — The Act of Oct. 22, 1914, imposing on bankers a tax of $1.00 for each $1,000 of capital used or employed, is to be strictly construed, and therefore a corporation engaged in insuring titles, executing trusts, safe deposit, real estate and banking, is subjected to a tax only upon so much of its capital as actually is used in banking. Reserve funds of the corporation permanently invested are not to be included in the banking capital subject to tax unless actually used therefor, although the possession of such funds indirectly assists the banking department by enhancing the amount of credit obtainable. The case of *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, was cited and approved and also the case of *Anderson* v. *Farmers' Loan & Trust Co.,* 241 Fed. 323. — *Real Estate Title Ins. & Trust Co.* v. *Lederer,* 263 Fed. 667.

FEDERAL SALES TAX—SALE. — When a person buys a chassis and sends it, together with the kind of body he wants, to someone to have the body put on the chassis or sends the chassis to a body-builder to have a body put on it and it is then returned to him as an automobile truck, there has been no sale of an automobile truck. — *Rech-Marbaker Co.* v. *Lederer,* 263 Fed. 593.

NEW YORK STOCK TRANSFER TAX—EFFECT OF FAILURE TO AFFIX STAMPS.—Where an assignment of shares of corporate stock is made in another state, and delivery of the transfer is made in this state, the assignment is invalid, if Tax Law, Sec. 270, requiring stamps to be affixed to all sales and transfers of shares or certificates of stock has not been complied with, notwithstanding such other state has no such requirement.

In a suit to compel a corporation, its officers and directors to transfer certain shares of stock upon the books, it was not necessary for defendant to plead that no tax stamps were affixed to the assignment, as required by Tax Law, Sec. 270; payment of such stamp tax being an essential part of plaintiff's cause of action.

In a suit to compel a corporation, its officers and directors to transfer certain certificates of stock upon the books, the assignment of the certificates was inadmissible in evidence, where the stamps required by Tax Law, Sec. 270, had not been affixed, section 278 providing that proof of such assignment shall not be offered or received in evidence where no stamps are affixed.—*Luitwieler* v. *Luitwieler Pumping Engine Co.,* 179 N. Y. Supp. 463.

NEW YORK STOCK TRANSFER TAX—WHEN TAX ACCRUES.—The penal section of Tax Law, Sec. 278, requiring payment of tax on corporate stock transferred as a gift *inter vivos,* is, by Personal Property Law, Sec. 170, deemed to take effect when the indorsement is actually made, so that, where the husband died after making the gift to plaintiff wife but before indorsement of certificates, the wife, as administratrix of her deceased husband may, by order of court, properly indorse such certificate, affixing and canceling the stamps required by statute, and then the corporation shall transfer upon its books such shares to plaintiff.—*Reinhard* v. *Sidney B. Roby Co.,* 179 N. Y. Supp. 781.

NEW YORK STOCK TRANSFER TAX.—Readjustment of debt agreement of stockholders and voting trustees HELD not to constitute double transfer of stock, so as to require a double transfer tax, although the legal title to the stock was passed from one set of voting trustees to another set by direction of adjustment managers, who had the right to have the legal title passed to

them or to direct a transfer.—*Hudson & M. R. Co.* v. *State,* 125 N. E. 202.

Special District Tax. — In order to support a tax levied for special district purposes it must appear that the owners of taxable property located within the district have had an opportunity to vote upon the proposition or that other owners therein have voted to impose the tax upon the land in question. So held in a suit to enjoin the collection of drainage district taxes where the property of the taxpayer was not properly designated as within the district area when the proportion was submitted to the voters, though actually within the district.—*Burgnieres Co.* v. *Peterman,* 83 So. 756.

Delegation of Taxing Power—Constitutionality. — Assuming that Priv. Acts, Tenn. 1919, Ch. 745 and 791, relating to a soldiers' and sailors' memorial, require a mandatory tax levy by the county of Davidson and by the city of Nashville in aid of bonds authorized by such statutes, they do not, for that reason, violate Const., art. 2, Sec. 29, as to delegation of legislative power to tax. — *Hill* v. *Roberts,* 217 S. W. 826.

Relief from Penalties—Jurisdiction of Courts to Grant. — As penalties or interest are imposed by statute upon taxpayers who are in default, in order to insure prompt payment of taxes, which are necessary for the support of the government, the courts have no authority to relieve taxpayers therefrom.—*Rixey's Ex'rs* v. *Com.,* 101 S. E. 404.

Exemptions—Property of U. S. Shipping Board Emergency Fleet Corporation. — Property acquired and owned by the United States Shipping Board Emergency Fleet Corporation, owned and operated solely by the United States for governmental purposes, Held not subject to state taxation.—*U. S.* v. *Coghlan,* 261 Fed. 425.

Tangible Property in Warehouse.— Where tobacco was purchased by a nonresident of Kentucky between November, 1916, and May, 1917, and transferred to a certain county in that state to be graded, assorted, and prised, prior to shipment to England, but, owing to a shortage in shipping facilities, it was stored in warehouses, where it was situated on September 1, 1917, the assessment day, the tobacco was taxable in such county.

The burden is upon the party claiming an exemption from taxation to clearly establish that he is entitled to it, and no presumption will be indulged in his favor; the presumption, on the contrary, being that all tangible personal property in the state on the assessing date is subject to assessment at the place where it has an actual situs.—*John Ross & Co.* v. *Board of Sup'rs of Daviess County,* 217 S. W. 677.

Intangible Property of Estate Held by Two Trustees, One a Resident and One a Nonresident. — Bonds not expressly exempted by the Tax Act nor excluded therefrom, and which are located in New Jersey and are a part of an unsettled estate of a decedent are taxable at their true value in the taxing district in the state wherein the decedent resided at his death, though one of two executors and trustees is a nonresident of New Jersey.—*Yardley* v. *Essex County Board of Taxation,* 108 Atl. 299.

Stock Exchange Membership.—Membership in New York Stock Exchange owned and exercised by a resident of the state of Ohio is "personal property" having a taxable situs in state of domicile.

Domicile of owner is taxable situs of choses in action.—*Anderson* v. *Durr,* 126 N. E. 57.

Sales Contracts as Personal Property. — So-called leases, under which lessees were to pay taxes and assessments, interest on principal, and keep the property insured for the benefit of the parties thereto, as their interest might appear, and requiring the grantor to deed the property to the grantee upon payment of the stipulated sums on or before maturity, were sale contracts, and were assessable to vendor for taxation.—*In re Spurgeon,* 126 N. E. 238.

Personal Property Tax — "Annuities". — An "annuity" is a yearly payment of a certain sum of money granted to another in fee, for life or for years, and

chargeable only on the person of the grantor, although the term is often used as designating a fixed sum, granted or bequeathed, payable periodically but not necessarily annually.

An installment certificate issued by an insurance company in exchange for a policy which had become a valid claim on insured's death, whereby the insurer obligated himself to pay the beneficiary certain semi-annual payments for a stated period and thereafter a final payment, HELD subject to taxation as an annuity, the situs of which followed the domicile of the annuitant.—*Wilkin* v. *Board of Com'rs of Oklahoma County,* 186 Pac. 474.

FEDERAL ESTATE TAX—DEDUCTION OF PENNSYLVANIA COLLATERAL INHERITANCE TAX. — The decision of the Court below (257 Fed. 812) was affirmed by the U. S. C. C. A., Third Circuit (262 Fed. 52), holding that the Pennsylvania Collateral Inheritance Tax, being an estate tax, was deductible in determining the amount of the net estate under the Federal Estate Tax Act of Sept. 8, 1916, Title II. The C. C. A. states in its opinion that this decision has no bearing on the 1918 Revenue Act, Title IV; the latter act providing that "Estate Taxes" are not deductible.—*Lederer* v. *Northern Trust Co. et ano.,* U. S. C. C. A., Third Circuit, October Term, 1919. Petition for Writ denied by Sup. Ct., May 3, 1920.

"TAX"—WATER RENTS AS A TAX.—The court of appeals of New York is referred to in a recent decision by a lower court, as having laid down the rule in *N. Y. Univ.* v. *Am. Book Co.,* 90 N. E. 819, that a rate or charge for supplying water, not based upon the amount consumed, but determined with reference to the "dimensions, value, exposure, use," &c., of a building, is a tax, but that where the charge depends upon the amount used, the transaction is a voluntary purchase. This rule was followed in a case where the validity of a lien for taxes was involved.—*Pines* v. *Traktman et al.,* 178 N. Y. Supp. 90.

"TAX", "IMPOST", "TOLL". — In a recent case it became necessary to determine whether a charge made for the use of a sewer, was a "tax" in order to decide a jurisdictional question. It was decided to be a tax and not an ordinary debt as claimed. — *City of Madera* v. *Black,* 184 Pac. 397.

RECENT PUBLICATIONS

EDITED BY HARLEY L. LUTZ

TAXATION OF REAL ESTATE IN ARGENTINA

To our fellow member of the National Tax Association, Sr. Jorge Fernández of Santiago del Estero, Argentina, we are indebted for a most interesting treatment of the real estate tax in Argentina. The report conveying this information is the *Memoria de la Dirección de Castastro* of the province of Santiago del Estero for the year 1918. It corresponds in general to the annual report of one of our State Tax Commissions. However, Sr. Fernández has exceeded the ordinary bounds of such a report and has given us a study of the valuation and taxation of real estate throughout the entire country.

For the taxation of real estate there are two sets of laws, the national law that controls the taxation of real estate in the City of Buenos Ayres and in the national territories, and the provincial laws controlling the taxation of real estate within the several provinces.

Under the national law, the value of urban property and of improved rural property is obtained by adding the "true value" (capital value) of the improvement to the average of the land values of the three preceding years. Uncultivated rural property and pasturage are valued at the "average sale price" of the last three years preceding the time of valuation.

The provincial tax systems are of most interest. With one exception, the provinces as well as the national government express the assessment in terms of capital value. Several provinces, however, con-

sider rental value in estimating capital value. The rates average about 5 per mil, but interesting classifications are made in several of the provinces. Some provinces impose a higher rate upon urban than upon rural property, e. g., Entre Ríos, where urban bears 6 mils and rural bears 5 mils; while other provinces impose a higher rate upon rural than upon urban property, e. g., Buenos Ayres and Corrientes. The latter province imposes a progressive land tax ranging from 4½ per mil on estates valued from 1 to 25,000 pesos (dollars) to 8 per mil on estates valued at 400,000 to 500,000 pesos, an additional ⅛ per mil being added for each additional 100,000 pesos value above 500,000. This tax is not calculated upon each parcel but upon the entire wealth owned by the taxpayer in the province.

In his review of the laws of the different provinces, Sr. Fernández points to the progressive principle of Corrientes as the most equitable to be found in Argentina. In all of the other states the proportional principle is followed with the exception of a few cases where special land taxes for road funds are levied at uniform amounts per hectare, irrespective of the value of the land.

In explanation of Sr. Fernández' preference for progressive land taxes, we must remember that in Argentina land ownership is concentrated to an extent unknown in the United States. It has been said by one of the former finance ministers of Argentina that in that country there exists the most notorious cases of *latifundia* to be found in modern times. The so-called land-monopoly in Argentina is perhaps even worse than that of Mexico, for in the latter country many of the great estates having hundreds of thousands of acres are composed of arid lands where small farming is impracticable, while in Argentina many of the larger estates are composed of tillable lands that could be broken up and farmed more productively as small estates. In fact, the land values have increased so rapidly in Argentina that owners of these huge estates have devoted their incomes to the purchase of more land, much of which has been withheld from cultivation, the owners depending upon the "unearned increment" to recoup all expenses incurred.

In this connection Sr. Fernández condemns the great inequality in the assessment of real estate. While all property in the same class bears the same rate and while the valuations are supposed to be assessed at the same proportion of true value, the valuations are, as a matter of fact, most unequal, especially so in the national territories. To be sure, the national law provides for a board of equalization to which any aggrieved taxpayer may appeal, but Sr. Fernández informs us that only the wealthy benefit by this court and that the poor bear heavily disproportionate burdens.

For purposes of illustrating the methods of assessing real estate, the example of the province of Cordoba is instructive. In valuing the land the assessor is expected to take into consideration among other things the quality of the land, proximity to markets and roads, and the average of sales for the last five years.

In the case of urban property, the basis used is rent "produced or capable of producing." The value of "uncultivated" urban property is based upon the last sales of adjacent properties less 20%. The "untaxing of buildings" is partly achieved by exempting all buildings exclusively devoted to agriculture, cattle raising, etc. Further allowances are made such as 90% of the area of lakes, 70% of "unproductive mountains," and 30 to 50% of land unadapted to the cultivation of cereals, but good for pasturage.

Other interesting provisions are found, as in Mendoza where in the case of the transfer of property the sale price shall constitute the assessed valuation if greater than the original assessment, unless it can be shown that the sale price was "notoriously higher than the real value"; in Entre Ríos where the taxable value is the sale value "calculated on the average of the sales realized in the province during the preceding four years"; in San Luis where the taxable value is 70% of the "current value"; and in Tucumán and other provinces where the taxable value is the "current selling value".

In addition to the survey of real estate taxation in the various provinces, Sr. Fernández presents important constructive suggestions for the classification of real estate, and for more scientific methods of valuing each class of land. While Argentina has naturally looked to Italy, France and Spain rather than to the United States for her criteria of valuation and of

taxation, it is believed that much mutual benefit will result from an exchange of ideas between the two great republics of the Americas.

And it may be of interest to North Americans to learn that several ideas of recent interest to us are to be found in practice in Argentina, such as the "untaxing of buildings," progressive land taxes, and even a sort of capital levy in Corrientes in the form of an additional tax of one per mil for the payment of the public debt.

H. A. E. CHANDLER.

Columbia University.

FAIR VALUE. By Harleigh H. Hartmann. Houghton Mifflin, 1920.

The valuation of property for tax purposes differs essentially from the fair value used in rate cases. The term "value" has been loosely used by the courts and administrative officials. It must constantly be borne in mind that value differs according to the purpose for which it is to be determined. Valuation for rate purposes is to be distinguished from valuation for taxation, capitalization, purchase and sale, eminent domain, etc. In rate cases what is sought is not value or worth, but investment or cost. Nevertheless "fair value" is the base upon which the rate structure is erected. Taxes are usually assessed on the basis of fair market or exchange values.

Tax men generally may turn to Mr. H. H. Hartman's volume on "Fair Value" with the assurance that they will find an enlightening discussion of the elements constituting fair value. Having defined the value concept, the author then proceeds with its application to valuation cases before the courts and public service commissions.

In the section of the book devoted to the valuation of tangibles, such items as land, buildings and the appreciation thereof are discussed. Among the intangibles, consideration is given to good will, franchises, patent rights, etc. A whole chapter is devoted to depreciation, and the presentation here as throughout the book is clear and informing.

The author attempts the hopeless task of reconciling legal dicta with economic doctrine. Tax men realize that the result is not worth the effort. He contributes a clarifying analysis of the original cost and reproduction cost theories. Although he strongly favors the former method of appraisal, the arguments in support of the latter are fairly set forth. A table of cases and an adequate index will be found helpful.

Mr. Hartman will be recognized as the author of an article in the March BULLETIN. This book was originally submitted as an essay in the Hart, Schaffner and Marx competition and was awarded first prize.

ALEXANDER HAMBURG.

New York.

ARTHUR, D. H. Municipal Advertising which facilitated Tax Collections. Printers Ink, October 23, 1919. British Columbia cities institute successful campaigns to prod up slow payers.

BRADT, S. E. Motor Fees as a Basis of Bond Issues. The American City, Vol. XXII, p. 350. April, 1920. Discusses the Illinois plan of pledging motor fees as security for road-improvement bonds.

DEWARIN, M., and RENAUT, F. P. La Taxation des benefices de guerre en Scandinavie. Journal des Economistes, Nov., 1919. Compares the taxation of war profits in the three Scandinavian countries.

DOUCET, R. Les Impots en regime demagogique. Monde Econ., Oct. 25, 1919. Believes the French government is courting popularity by levying light taxes on wage-earners and not pressing for their collection.

FREY, M. W. Needed Reform in the Federal Tax Laws. Trust Companies, Nov., 1919. Advocates repeal of excess profits tax and other changes.

FRIDAY, David. Prices and the Excess Profits Tax. Ann. Amer. Acad., Vol. LXXXIX, p. 163. May, 1920. Holds that the excess profits tax has not been an important cause of rising prices.

HAIG, R. M. British Experience with Excess Profits Taxation. Amer. Econ. Rev., Suppl. Vol. X, No. 1, p. 1. March, 1920.

HOARE, R. M. Incidence of Taxation. Char. Organ. Rev., Oct., 1919. Divides the British nation into classes and estimates the tax burden on each.

LUTZ, H. L. The Progress of State Income Taxation Since 1911. Amer. Econ. Rev., Vol. X, p. 66. March, 1920.

MARSH, A. R. Proposes federal tax on Stock and Commodity Exchange Transactions, and its Probable Effects. Economic World, Vol. 105, p. 687. May 15, 1920.

MARYLAND. Third Biennial Report of the State Tax Commission. Feb., 1920. pp. 111. Baltimore.

MASSACHUSETTS. Report of the Tax Commissioner for the Year ending November 30, 1919. Boston, 1920. pp. 200. Contains material of interest on the new tax laws.

MISSISSIPPI. Report of the State Tax Commission on Assessments for the Tax Year 1918. Jackson, 1919. pp. 77.

MISSISSIPPI. Report of the State Tax Commission for the Year 1919. Recommends the exemption of intangibles and the revision of the income tax by the addition of proper administrative and enforcement provisions.

NICHOLSON, J. S. The Burden of Public Debt and Taxation and the Return to the Gold Standard. Economic World, Sept. 20, 1919. The first step toward the gold standard should be the reduction of public expenditures and the cessation of public borrowing.

PEARSON, C. C. The Present Status of Tax Reform in North Carolina. South Atlantic Quarterly, October, 1919. Constitutional Amendments are to come before the voters in 1920 for ratification.

REED, R. R. Discussion of Surtaxes on Capital Profits. I. B. A. of A. Bull., December 4, 1919. The increase in capital value should not, when the property is sold, be regarded as income.

WOODWORTH, L. D. Dangerous Taxation Tendencies. Protectionist, October, 1919. Deplores the tendency to rely on state subventions rather than special assessments or local taxes and to extend the privilege of tax exemption.

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